Geske and Sons, Inc. *and* International Union of Operating Engineers, Local 150, AFL–CIO. Case 33–CA–9557–2

April 26, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND TRUESDALE

On February 24, 1994, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed a brief in support of the judge's decision and a statement in response to the Respondent's exceptions. The Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

I. PROCEDURAL ISSUES

Before addressing the substantive allegations of the complaint, we must resolve two procedural issues concerning the Respondent's exceptions and supporting brief.

A. On April 29, 1994,[3] the Respondent timely filed exceptions (37 pages in length) to the judge's decision and a supporting brief (50 pages in length). By letter dated May 2, the Deputy Executive Secretary of the Board, acting on behalf of the Board, rejected the Respondent's exceptions and brief because these documents were not in conformity with the requirements set forth in Section 102.46(b)(1) of the Board's Rules and Regulations.[4] The exceptions document contained argument in support of the exceptions and included citations of authority that were used in an argumentative manner. The two documents, which totaled 87 pages in length, exceeded the 50-page limit proscribed by Section 102.46(j) of the Board's Rules.[5] The Deputy Executive Secretary returned the exceptions document and the brief to the Respondent. The Respondent was given an opportunity to revise and refile its exceptions document and brief ''in proper format on or before May 9.''[6]

On May 9, the Respondent filed its revised exceptions (26 pages in length) and the 50-page brief that had been previously submitted on April 29. By letter dated May 12, the Deputy Executive Secretary notified the Respondent that its revised exceptions were still not in conformity with Section 102.46(b)(1) for the reason stated in the May 2 letter. Accordingly, the Deputy Executive Secretary rejected the Respondent's brief in support of exceptions, and accepted and forwarded only the Respondent's revised exceptions to the Board for review. In the letter, the parties were also notified that answering briefs to the Respondent's exceptions were due May 23.[7]

On May 17, the Respondent filed its ''Motion to the Board to Accept the Attached Amended Revised Exceptions for Filing Instanter with its Previously Filed Brief.'' Attached to its motion were the Respondent's amended revised exceptions (20 pages in length). In its motion, the Respondent asserts that it had ''made a good faith effort to comply with [Board Rule Section

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

We deny the Respondent's request, in effect, to reopen the record to include a purported affidavit of Matt Schaltz and a letter to the Respondent's counsel from a Board agent. Sec. 102.48(d)(1) of the Board's Rules and Regulations provides that the record will be reopened if evidence sought to be introduced has become available only since the close of the hearing and is newly discovered. The evidence now proffered by the Respondent was available at the time of the hearing, and the Respondent did not present it to the judge for consideration.

[3] All dates are in 1994, unless otherwise indicated.

[4] Sec. 102.46(b)(1) reads, in pertinent part:

> Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 102.46(j).

[5] Sec. 102.46(j) reads, in pertinent part:

> Any brief filed pursuant to this section shall not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (h) of this section, shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 10 days prior to the date the brief is due.

[6] We note that the Respondent has never sought permission to exceed the 50-page limit for briefs set by Sec. 102.46(j) of the Board's Rules by filing a written motion to that effect.

[7] On May 19, June 16, and July 12 and 15, the Charging Party requested an extension of time in which to file answering briefs. These requests were granted. The due date for answering briefs was ultimately extended to August 3.

102.46(b)(1)]'' and that the other parties have not suffered any prejudice by these good-faith efforts. The Respondent further states that it was confused by a purported conflict in the Board's Rules in that ''Section 102.46(b)(1) requir[es] the party to 'state the grounds' for the exception, but that [the exceptions document] also 'shall not contain any argument or citation.''' The Respondent claims that its uncertainty about this requirement led to the alleged failure on its part to fully comply with Section 102.46(b)(1). The Respondent requests that, for purposes of reviewing the judge's decision, the Board accept its amended revised exceptions and its previously submitted 50-page brief. In the alternative, if the instant motion is denied, the Respondent requests that its original exceptions filed on April 29, and not its May 9 revised exceptions document, be accepted and considered by the Board in our deliberations.[8]

By order dated May 19, the Deputy Executive Secretary notified the parties that the Respondent's motion had been forwarded to the Board for consideration. In addition, the Respondent's April 29, May 9 revised exceptions, May 17 amended revised exceptions, and its 50-page brief were also forwarded to the Board in connection with our consideration of the Respondent's motion.[9] Neither the General Counsel nor the Charging Party has filed any opposition to the Respondent's motion or to the Board's acceptance of the May 17 amended revised exceptions and the April 29 brief.

Upon careful review, we agree that the April 29 exceptions document contains considerable argument, and the Respondent, therefore, failed to fully or even substantially comply with the requirements of Section 102.46(b)(1) and Section 102.46(j).[10] In the circumstances presented here, as described above, however, we grant the May 17 motion and accept the Respondent's amended revised exceptions and supporting brief. We note that there was no opposition to the motion from the other parties, no challenge to the Respondent's assertions of good-faith efforts, and no showing of prejudice to the other parties.

Notwithstanding this result, we wish to stress the importance of close attention to the requirements of Section 102.46(b)(1) and Section 102.46(j) by the party filing exceptions. We emphasize that a person should not expect in the future, or consider as now the norm, that the party filing exceptions will be afforded several opportunities to put its exceptions in proper form in conformity with the filing requirements of the Board's Rules. In addition, we do not mean to suggest by our ruling in this case that the mere inclusion of a case name and citation necessarily runs afoul of Section 102.46(b)(1). There may be instances in which a case citation is the most concise means possible of identifying the legal issue on which exception is taken—e.g., exception is taken ''to the judge's failure to find that the Respondent unlawfully deprived employees of their *Laidlaw* [171 NLRB 1366 (1968)] reinstatement rights,'' or exception is taken ''to the judge's failure to find that the Union's picketing violated the standard of *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950).'' Any use of a case citation beyond the mere identification of a legal issue is likely to verge on argument, however, and must be confined to the supporting brief.[11]

B. On July 12, the Respondent filed a motion to add a clarifying exception to its May 17 amended revised exceptions document. The Respondent asked leave to file an 87th exception, which it called a ''clarifying'' exception to its ''central'' issue relating to the Board's decisions in *Loehmann's Plaza*, 305 NLRB 663 (1991), and *Davis Supermarket*, 306 NLRB 426 (1992). By letter dated July 22, the Deputy Executive Secretary, acting on behalf of the Board, denied this motion as untimely, but he further noted, albeit erroneously, that the motion was not supported by an affidavit as required by Section 102.111(c) of the Board's Rules. In fact, attached to the motion was an affidavit by the Respondent's counsel, Michael E. Avakian. On August 8, the Respondent filed a motion for reconsideration of the July 22 ruling and rejection of its ''clarifying'' exception.

We reaffirm our July 22 ruling that the Respondent's July 12 motion was untimely. We find that the Respondent has not shown good cause for filing out of

[8] For this reason, we find it unnecessary to pass on whether the Respondent's May 9 revised exceptions meet the requirements of Sec. 102.46(b)(1) and Sec. 102.46(j).

[9] The General Counsel and the Charging Party were properly served with all these documents.

[10] Cf. *America's Best Quality Coatings Corp.*, 313 NLRB 470 fn. 1 (1993) (substantial compliance).

[11] This approach is entirely consistent with the context in which our rules with respect to exceptions and briefs were adopted. Effective October 15, 1982, the Board revised its Rules and Regulations to place a 50-page limit on briefs filed with the Board following transfer of the case to the Board. Thus, under Sec. 102.46(j) of the Board's Rules, unless a party receives permission to file an enlarged brief, briefs in support of exceptions and answering briefs are limited to 50 pages. Thereafter, the Board was faced with a recurring issue that arose when a party filed a 50-page supporting brief, but included in its exceptions document ''argument and or citation of authority,'' thereby exceeding (intentionally or unintentionally) the 50-page limit on briefs envisioned by the Rule. Effective June 1, 1986, in an effort to resolve this problem, the Board published in the Federal Register a notice of its intention to amend its Rules ''to provide a clearer description of the exceptions document and the briefs, and, therefore, to facilitate administration of the 50-page limit on briefs by precluding placement in the exceptions of material that appropriately belongs in the brief.'' Thus, Sec. 102.46(b)(1)(iv) requires that each exception ''shall concisely state the grounds for the exception.'' The Rule further provides that ''*[i]f a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of exceptions, but such matters shall be set forth only in the brief.*'' (Emphasis added.) This amendment essentially eliminated the confusion that was prevalent in this area before the 1986 Rules revision.

time, as required by Section 102.111(c) of the Board's Rules.[12] The July 22 letter's inadvertent administrative error regarding the inclusion of an affidavit does not affect our ruling.

Even assuming arguendo that the July 12 motion was timely, we do not see how the proffered ''clarifying exception'' would clarify the Respondent's amended revised exceptions, which are part of the record in this case. The clarifying exception purports to articulate the Respondent's contentions regarding the appropriateness and applicability of the Board's decision in *Loehmann's Plaza*, supra, a case relied on by the judge to find that the Respondent's state court lawsuit was preempted and to remedy the unfair labor practice. The Respondent's amended revised exceptions 25, 75, and 84 directly address the issue of preemption and the appropriateness of the remedy. The Respondent admits as much in the affidavit attached to its July 12 motion, in which its counsel, Michael E. Avakian, states that ''[a]t all times, Respondent believes the question of law has been [e]xcepted to . . . .'' In any event, as discussed infra, we do not reach the preemption issue because we adopt the judge's finding of a violation of Section 8(a)(1) of the Act based on the other legal theory advanced by the General Counsel.

II. THE 8(A)(1) VIOLATION

We agree with the judge's findings and conclusion that the Respondent violated the Act, beginning on September 5, 1991, by filing, maintaining, and prosecuting a state court lawsuit against the Charging Party and Chauffeurs, Teamsters and Helpers, Local 301, and their agents. We agree with the judge, for the reasons she fully sets forth, that the lawsuit was without reasonable basis[13] and was motivated by an intent to retaliate against the Charging Party's protected concerted activity, i.e., seeking to organize the Respondent's employees by engaging in lawful recognitional picketing. We also adopt the recommended remedy in this regard.

In light of our finding that the lawsuit violated the Act because it was baseless and had a retaliatory motivation, we find it unnecessary to pass on whether the suit also violated the Act because it was preempted by Federal law. We shall modify the Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Geske and Sons, Inc., Crystal Lake, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and renumber the subsequent subparagraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file, maintain, or prosecute lawsuits with causes of action which are without reasonable basis and are motivated to retaliate against activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL file a motion for leave to withdraw the complaint and amended complaints which we filed against defendants Operating Engineers Local 150, Chauffeurs, Teamsters and Helpers Local 301; Chuck August; Robert Paddock; Gary Laney; Michael Quigley; Kal Lester; Angel Delrivero, Bud Layoff; and Mike Haffner, to the extent that such complaints include allegations contained in the third amended complaint and its predecessors.

WE WILL reimburse these defendants in that lawsuit, with interest, for all legal expenses incurred in connection with such allegations, to date and in the future.

GESKE AND SONS, INC.

Judith T. Poltz, Esq., for the General Counsel.
Michael Ernest Avakian, Esq., of North Springfield, Virginia, and *Gerard C. Smetana, Esq.*, of Chicago, Illinois, for the Respondent.
Louis E. Sigman, Esq., of Chicago, Illinois, for the Charging Party.

[12] Sec. 102.111(c) reads, in pertinent part:

> In unfair labor practice proceedings, motions, exceptions, answers to a complaint or a backpay specification, and briefs may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result. A party seeking to file such motions, exceptions, answers, or briefs beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts.

[13] In agreeing that the lawsuit lacked a reasonable basis, Member Stephens does not rely simply on the Respondent's lack of success in the state courts. He independently concludes that the Respondent's claims were meritless under the appropriate Federal standard set out in *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61–65 (1966), and *Letter Carriers v. Austin*, 418 U.S. 264, 272–273 (1974). *Phoenix Newspapers*, 294 NLRB 47, 49 fn. 16 (1989).

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Chicago, Illinois, on December 3 and 4, 1992, pursuant to a charge filed by International Union of Operating Engineers, Local 150, AFL–CIO (Operating Engineers Local 150) against Respondent Geske and Sons, Inc. (Geske) on September 19, 1991, an amended charge filed on March 24, 1992, and a complaint issued on March 30, 1992, and amended on March 31 and April 30, 1992.

The complaint as of March 31, 1992, alleged that Geske violated Section 8(a)(1) of the National Labor Relations Act (the Act) by filing a state court lawsuit against Operating Engineers Local 150 and Chauffeurs, Teamsters and Helpers, Local 301 (Teamsters Local 301) about September 5, 1991; by filing an amended complaint in state court against them and Chuck August,[1] Robert Paddock, Gary Laney, Michael Quigley, Kal Lester,[2] Angel Delrivero, Bud Layoff,[3] and Mike Haffner, about September 27, 1991; and by maintaining and prosecuting this September 5 and 27 lawsuit; which lawsuit included certain causes of action (for trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage), which are without reasonable basis and were motivated by an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize Geske's employees by engaging in lawful recognitional picketing. Of the eight individual defendants, two (Layoff and Haffner) were connected with Teamsters Local 301, and the rest were connected with Operating Engineers Local 150. The April 30, 1992 amendment to the instant complaint added the allegation that Geske violated Section 8(a)(1) since about September 5, 1991, by filing, maintaining, and prosecuting the foregoing lawsuit with causes of action for trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage, that are preempted by the Act.

The September 1991 state court lawsuit in question requested injunctive relief as well as damages. The state trial court issued a temporary restraining order against Operating Engineers Local 150 and Teamsters Local 301 following an ex parte proceeding in which no witnesses testified. Thereafter, the state trial court conducted a 9-day hearing in which Operating Engineers Local 150 and Teamsters Local 301 were represented by counsel. After Geske had concluded its case in chief as to its request for a preliminary injunction, and before the defendants had begun to put in their case, the state trial court denied the requested preliminary injunction on the ground, inter alia, that Geske had little likelihood of success on the merits. For reasons which will appear infra, the defendants in the state court proceeding have never had an opportunity to put in their case to the state trial court. Most of the record in the state court proceeding was received in evidence in the unfair labor practice proceeding before me. The parties before me agreed that I could accept that transcript in the same way that I would be able to handle a transcript in a case heard by an administrative law judge who died. Because the defendants in the state court proceeding have not had an opportunity to put in a case there, however, I am reluctant to base factual findings on that record alone. Accordingly, as to the state court transcript, I have generally limited myself to merely summarizing the testimony, and have based no findings thereon except where specifically stated.[4]

Local 150's initial charge in the instant case was filed on September 19, 1991; alleged that Geske had violated Section 8(a)(1) of the Act; and went on to allege, ''Since on or about September 7, 1991, [Geske] has unlawfully interfered with, restrained and/or coerced various individuals, including Butch Powers [see infra, part III,P], in the exercise of their rights guaranteed by Section 7 of the Act, including, but not limited to, the honoring of IUOE, Local 150's lawful primary picket by threatening such individuals with the improper filing of legal proceedings seeking state, criminal and/or civil sanctions for their voluntary refusal to load Employer trucks.'' The amended charge was filed on March 24, 1992, and alleged, in part, ''On or about September 5, 1991, [Geske] filed a state court lawsuit . . . against Operating Engineers Local 150 and Teamsters Local 301 and on September 25, 1991 filed a Third Amended complaint which named as defendants . . . Local 150, Chuck August, Robert Paddock, Gary Laney, Michael Quigley, Kal Lester, and Angel Delrivero . . . Local Union 301, Bud Layoff, and Mike Haffner. The filing on [sic] and prosecution and maintenance of this lawsuit since September 5, 1991 are unfair labor practices in violation of Section 8(a)(1).'' Geske's opening brief (at 5) alleges that the amended charge ''is entirely different

[1] So referred to in the complaint, in the instant record, and in this decision. His legal name is Charles L. August.

[2] So referred to in the complaint, in the instant record (which sometimes uses ''Cal'' as a spelling), and in certain parts of this decision. His legal name is Kevin Lester.

[3] So referred to in the complaint, in the instant record, and in certain parts of this decision. His legal name is Reginald Layoff.

[4] At the beginning of the hearing before me, Geske's counsel, Gerard C. Smetana, who on Geske's behalf actively participated in the hearing before the state trial court, stated, ''The fact that we happened not to prevail on a preliminary injunction hearing, and the case is still there, doesn't mean we can't prove our case [because] we've got lots of other evidence to prove our case. We . . . put on certain evidence which we thought . . . was enough to get a preliminary injunction.'' On the second and last day of the hearing before me, Smetana stated that ''some of the best evidence we have is not yet in the [state court] record. And, therefore . . . it is not appropriate as a matter of law for this Court to interfere with the State court proceeding until we put in our case on the merits.'' At that point, as to certain questions which Smetana sought to put to General Counsel witness Chuck August on cross-examination, I sustained the Charging Party's and the General Counsel's objections on the ground that these questions about August's statements on the picket line exceeded the scope of the direct examination (see Fed.R.Evid. 611(b)). At the same time, I stated that Smetana could call the witness as his own for the purpose of adducing the testimony in question as part of his own case. Smetana chose not to do so. Although Chuck August is a business agent of Local 150 and obviously identified with it, Smetana could have called him under Rule 611(c) of the Federal Rules of Evidence and, indeed, did call him as Geske's witness during the state court trial, and adduce testimony from him about his statements on the picket line (see infra, part III,I,1). This colloquy aside, consideration of Geske's evidence adduced before me but not (so far as I can ascertain) before the state trial court fails to enlighten me as to the nature of this ''lots of other evidence.''

from its predecessor. Most of the acts complained of are outside the six-month § 10(b) statute of limitation.'' Because this defense was not pleaded in the answer or litigated at the hearing, and was not raised until Geske filed its initial brief with me, this defense was not raised in a timely manner and, therefore, was waived. *Public Service Co.*, 312 NLRB 459 (1993); *DTR Industries*, 311 NLRB 833 fn. 1 (1993); *Helnick Corp.*, 301 NLRB 128 (1991). Moreover, even if the March 24, 1992 charge stood alone, it would timely encompass Geske's conduct in maintaining and prosecuting the lawsuit in question since September 24, 1991, which date preceded the last 3 days of the 9-day state court hearing on Geske's September 5, 1991 complaint. In any event, I find that the first charge, which was filed on September 19, is sufficient to support the instant complaint against Geske. See *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *NLRB v. Complas Industries*, 714 F.2d 729, 733 (7th Cir. 1983); *Recycle America*, 308 NLRB 50 (1992); *Embassy Suites Resort*, 309 NLRB 1313 (1992).

On the entire record, including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed by Geske (who also filed a reply brief), counsel for the General Counsel (the General Counsel), and Operating Engineers Local 150, I make the following

FINDINGS OF FACT

I. JURISDICTION

Geske is a Delaware corporation with an office and a place of business in Crystal Lake, Illinois. Geske is engaged in the business of asphalt paving and manufacturing of asphalt mix for sale to commercial customers in the construction industry. During the 12-month period preceding the issuance of the original complaint, Geske's gross revenues exceeded $250,000, and Geske purchased and caused to be delivered to its Crystal Lake facility more than $50,000 worth of goods and materials directly from States other than Illinois. I find that, as Geske admits, Geske is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

II. THE STATUS OF OPERATING ENGINEERS LOCAL 150 AND TEAMSTERS LOCAL 301

Operating Engineers Local 150 and Teamsters Local 301 are each labor organizations within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[5]

The stock ownership in Geske and Sons, Inc. is equally divided between Larry Geske (Larry) and his brother, Leroy Geske Sr. (Senior). Larry is Geske's vice president and secretary-treasurer. Senior is Geske's president. Senior's daughter, Lori Geske (Lori), is the corporation's general manager. Her duties include handling customers' accounts, and she regularly exercises authority to extend credit on the corporation's behalf. The corporation admits that, at all times material, Senior and Lori have been the corporation's agents, acting on its behalf, and are supervisors within the meaning of the Act.

Leroy Geske Jr. (also referred to in the record as Leroy Geske II or III, and referred to herein by his nickname Tigger), is Senior's son and Lori's brother, and is employed by the corporation as a truckdriver. Also in the corporation's employ is Larry's son, Larry Michael Geske (Mike), a truckdriver. In 1991, Tigger and Mike were in their mid-20s.

Lori testified before the state court that Geske employs about 20 employees. Geske's employees include heavy equipment operators, laborers, and truckdrivers. So far as the record shows, Geske has never had a bargaining agreement with any labor organization.

B. *The Arrival of Pickets at Geske's Facility on August 10, 1991*

During an undisclosed period, which included August 10, 1991,[6] Operating Engineers Local 150 picketed at the premises of a paving company, The Patching People (Patching), with signs which stated, ''IOUE Local 150 on Strike Against The Patching People for Recognition as Majority Representative of Company's Operating Engineer Employees.'' On August 10, Patching's trucks drove from Patching's premises to Geske's facility, in order to pick up materials which Geske had agreed to supply to Patching. Patching's trucks were followed by Operating Engineers Local 150 to the Geske facility, where the pickets remained at the entrance, displaying their signs, while the Patching trucks picked up material.

On September 26, 1991, James A. Smith testified at the state court hearing to the following effect: Together with his father and brothers, he conducts a business as a common carrier under the name of W. Smith Cartage, which before some time in August 1991, had a contractual or business relationship with Geske. Between April 1, 1991, and about August 10, 1991, W. Smith Cartage sporadically delivered sand and gravel to Geske, and on a daily basis delivered to Geske two to four loads of AC-10, a kind of oil which is essential to the making of asphalt. During this period, W. Smith Cartage supplied 100 percent of Geske's needs for AC-10. On August 10, while a driver for W. Smith Cartage was in the process of delivering AC-10 to Geske, James A. Smith was visited by Mike Haffner, who is an officer of Teamsters Local 301. W. Smith Cartage has a collective-bargaining agreement with Teamsters Local 301. Haffner said that a driver for W. Smith Cartage was delivering a load to Geske, and asked James A. Smith to get him out of there. James A. Smith said that he could not do that, because the trailer would be ruined if the AC-10 was permitted to cool off before being unloaded. Smith said, however, he would not send a truck back if there was a problem. Haffner said, ''All right . . . we try to help you guys when you need help, and we need help now and you're not trying to help me.'' Following that conversation, Smith did no further business with Geske.

On September 26, 1991, Mike Geske testified at the state court hearing to the following effect: On August 10, 1991, he observed pickets which followed Patching's trucks when they left Geske's premises, and Kal Lester (Operating Engineers Local 150's business representative) yelled across the road that Geske was ''going to be next.'' On September 13,

[5] My findings under this heading are based partly on testimony at the state court hearing. Such testimony is largely corroborated by the testimony before me and seems unlikely to be disputed.

[6] All dates hereafter are 1991, unless otherwise stated.

1991, Jack Pease testified at the state court hearing to the following effect: He is associated with Pease Construction Company, Spruce Lake Sand and Gravel, and Fox Lake Ready-Mix. About August 10, 1991 (see infra, fn. 8), he was in the area of the Geske plant and went down there ''just out of curiosity.'' He observed Gary Laney and Chuck August (Operating Engineers Local 150's business agents) in the area, and half a dozen pickets, with the signs which named Patching, standing in the roadway 5 to 7 feet apart, when a Performance Paving truck drove up. One of the pickets waved at it to stop; it did so. An unidentified person said that ''the plant's broke down.'' August said, ''Geske employees are on strike, why don't you go to Curran?'' The Performance Paving truck turned around and left. A minute or two later, an All American truck drove up. August said to the driver that Geske was on strike, ''Why don't you go to Curran?'' Others standing on the picket line said, ''We know where you park your truck in Mundelein,'' and lit a cigarette lighter without having a cigarette. A week or so later, on a day when ''I'm fairly sure'' Geske's name appeared on the picket signs,[7] Pease drove into the plant area (''I was doing kind of a visual inventory of the aggregate products on the ground'') and looped back out. Half a dozen pickets were there, and one individual had a cigarette lighter up in the air. Pease purchases asphalt from Geske from time to time, and also testified to various incidents where Local 150 at least allegedly interfered with his own business but which did not involve Geske, so far as the record shows.[8]

On September 26, 1991, Mike testified before the state trial court that between August 19 and September 17, during a period when Geske was unable to get cartage from other companies, Pease did cartage for Geske.

C. *Events on August 12, 1991*

An affidavit executed by Senior on September 5, 1991, and filed with the state trial court in connection with the lawsuit which is the subject of the complaint before me, states as follows: He had received reports on Saturday, August 10, that on that day, when Patching's trucks arrived, they were followed by pickets from Operating Engineers Local 150 with signs naming Patching. At the end of work on that day, Geske's plant operator, David Schroeder, told Patching that he was going to delay loading Patching's trucks with Geske's material because an anonymous caller had threatened to burn Schroeder's house down. On August 12, a Patching representative telephoned Senior and asked if Geske was going to load Patching's trucks. Senior said that he had called another asphalt company (Palumbo's) to ask if it could take the trucks because Local 150 was ''hassling'' Geske. Patching's representative said that if Geske would load the trucks that were there, Patching would not come back. About 20 minutes later, Local 150's business agent, Chuck August, telephoned Senior and asked what Geske was going to do with the Patching trucks on Geske's premises. Senior asked whether Palumbo's could take care of Patching. Chuck August said that Patching's trucks could not get loaded at Palumbo's or any plant in the Chicago area, and asked what Senior was going to do with Patching's trucks. Senior said that he had agreed with Patching that if Geske would load these trucks, Patching would not return to Geske. August said, ''Okay, if you load those trucks and that's all, we're out of here.''

An affidavit executed by Lori on September 5–6, and filed with the state trial court in connection with the lawsuit which is the subject of the complaint before me, states as follows: After the foregoing conversation between August and Senior, she drove out to the plant and saw Dave Schroeder and Ron Schroeder, whom she described as Geske ''employees'' who were loader operators, talking with a man whom she did not know. As she came up, everyone got quiet. She asked the unknown man who he was. He reached out his hand, introduced himself as ''Chuck August, Local 150,'' and asked Lori who she was. She told him, went to her car, and took out a videocamera. August started to leave, but she called him and he stopped. She went over to him, turned on the videocamera, and asked what he was doing there that day. He said that he had just stopped by to say hi. She asked him if he knew anything about the ''ruckus'' there on August 10. He said that he did not know what she was talking about. She asked whether he was telling her that he had not been there. He said that he was not saying that, but that Lori should have been there. She said, ''[I]f it happens again I will be.'' August then walked to his car and drove off; she continued to videotape him until he left. Then, she asked the Schroeders what August had been doing there. They told her that August had said, ''the Union was pulling out and they did not want to mess with us.'' She asked what had happened on August 10. Dave Schroeder said that he had received a call from someone who did not identify himself and who said that if Schroeder loaded any more trucks (the only trucks there were Patching trucks) ''they would burn his house down.'' Dave Schroeder told her that on August 10 ''there had been cars all over the place, trucks backed up, the police were out there, and one of [Patching's] drivers asked to use the phone to call the sheriff.''

On September 12, 1991, Lori testified at the state court trial to the following effect: On August 12, she approached Chuck August, who was on the premises of Geske's asphalt plant talking to the Schroeders. She had never met August before and asked who he was. After he introduced himself, she took out her videocamera, and he started to leave the property. When she called him by name, he stopped, whereupon she turned on her videocamera and asked what he was doing there. He said that he just stopped by to say hi. She asked him if he knew what had happened at the plant on Saturday, August 10. He said that he did not know what she was talking about. She asked whether he was telling her he had not been there. He said, ''I am not saying that,'' and that she should have been there. She told him that ''if it happens again I will be.''

Lori testified before me to the following effect: When she approached August and the Schroeders on August 12, August

[7] The parties before me stipulated that the picketing with signs naming Geske began about August 19.

[8] Geske's February 1992 brief to the Illinois appellate court contended that the events to which Pease testimonially attached the date of about August 10, 1991, actually occurred on August 19. Geske's brief rested this contention on an at least purported affidavit from Rob Moran (identifying him as All American Asphalt's principal and general manager) which describes similar incidents and ''puts these activities on August 19, 1991'' (according to Geske's Br. at 11). The purported affidavit, which is attached to that brief, states that such incidents occurred on August 10. Moran (also referred to in the record as Morin) did not testify before either the state court or me.

asked her who she was, she identified herself and asked who he was, he identified himself and gave her his business card, she walked back to her car, and he left. She testified that after August left, she had a conversation with the Schroeders; but she was not asked about its content and denied following them to any location. See infra, part III,F.[9]

D. *Picketing Directed at Geske Beginning on August 19, 1991; Alleged Events on that Day*

Geske's plant is situated on one side of a dead end road, which is off State Route 14 and is owned by the county conservation district. Lori testified at the state court trial that the part of the county conservation road, which proceeds between Route 14 and the Geske plant, is 15 to 20 feet wide, is paved, but has no shoulders except grass. Also fronting on the county conservation road, and across from the Geske plant, is a plant owned by Melahn Construction Company (Melahn). This plant is occupied by Prestress Engineering Corporation, a Melahn subsidiary, which at all material times has been party to collective-bargaining agreements with Operating Engineers Local 150 and Laborers Local 681.

At 4:30 a.m. on August 19, 1991, five or six pickets arrived at the Melahn plant with signs bearing the legend, ''I.U.O.E. LOCAL 150 ON STRIKE AGAINST GESKE FOR RECOGNITION AS MAJORITY BARGAINING REPRESENTATIVE OF COMPANY'S OPERATING ENGINEERS.''[10] The pickets parked on the premises of Melahn, which had given Operating Engineers Local 150 permission to use Melahn property for this purpose.[11] It is undisputed that Operating Engineers Local 150 continued to picket Geske with these signs for at least 30 days thereafter, and that at the very least, Teamsters Local 301 assisted Local 150 in this picketing.[12] The pickets paraded on the roadway, about 20 feet from the entrance to Geske's plant. Some picket signs were planted in the ground on Melahn property and on either side of the entrance to (but not on) Geske's property. An affidavit executed by Lori on September 5–6, 1991, in connection with the state court lawsuit, avers that since August 19, from 6 to 12 pickets had parked at Melahn, usually arriving early in the morning; had stood in the middle of the road and in the paths of Geske customers' trucks; and had shouted to the drivers. On September 25, 1991, Geske driver, Jon Hansen (also spelled ''Hanson'' in the record) testified at the state court trial that although the pickets sometimes held their hands up ''in a stopping fashion,'' he had invariably driven into and out of the Geske plant without stopping. On September 24, 1991, Tigger testified at the state court trial that various employers do not make deliveries to Geske when pickets are present, and that when picketers are present at the locations of various material production pits, Geske cannot obtain materials. On September 26, 1991, Local 150 Business Representative Chuck August testified at the state court trial that while on the picket line, he and other pickets wrote down the names or license plates of customers' and suppliers' trucks that came to the Geske plant, and the date and time of the day of their arrival.[13]

Local 150 Business Representatives Chuck August and Lester testified before me that between 11 a.m. and noon on August 19, 1991, Larry told Geske employee Ron Coss, a truckdriver, that Larry would close the doors before Geske would go union. August testified that on this occasion, Larry had driven up to the plant in a company vehicle consisting of a Bronco which was ''multi-colored, frost blue . . . with stripes through it.'' Larry testified without contradiction that the only blue Bronco owned by Geske is a two-tone blue with a snowplow permanently attached to the bumper, and that during the summer of 1991 it was unused. Larry further testified that the company Bronco which he customarily drives is light green with a beige roof. In view of this testimony about the company Broncos, and for demeanor rea-

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[9] Some of Lori's testimony summarized in this paragraph appears on p. 313 of the transcript of testimony taken before me. Geske's opening brief states (at 18, fn. 18), ''The transcript appears to have erroneously transposed the date on this page alone from August 21 to August 12.'' Page 313 states that in examining Lori, Geske counsel Smetana stated, ''I call your attention to August 12, 1991, which is a Monday;'' August 12 was a Monday, but August 21 was a Wednesday. Then, that page states that Lori replied, ''On August 12th'' to the question of when she first met Chuck August, and that attorney Smetana then asked, ''[H]ow did it come that you happened to meet Chuck August on August 12th?'' Furthermore, Lori testified during the state court trial that she first met Chuck August on August 12. Page 313 of the transcript in its present form reflects my own recollection of what was said at the hearing. I find that page 313 accurately sets forth what was said at the hearing.

[10] At the state court trial, Jack Pease testified that on dozens of days between 1989 and March 28, 1990, Local 150 had picketed certain operations with signs stating, ''J. Pease does not pay the prevailing wage or the area standards,'' and that these picket lines had been crossed by suppliers, including some unionized suppliers. Pease went on to testify that no unionized suppliers had crossed these picket lines at these locations since, on March 28, 1990, Local 150 put up signs which were identical to those quoted in the text except that Pease was named instead of Geske. Geske's reply brief (at 4 fn. 3) cites this testimony by Pease in attempted support of the assertion that Pease ''testified that the Union a year prior had utilized area standards signs and switched to the ''ON STRIKE'' signs because of the greater effect in successfully turning customers and suppliers away.''

[11] My finding that Melahn had given such permission is based on August's uncontradicted testimony. I can find nothing in the record to support the assertion in Geske's reply brief (at 22) that before the filing of the third amended complaint on September 27, 1991, Melahn ''had unknowingly allowed its property to be used by Local 150;'' the further assertion in Geske's reply brief (at 4–5) that Melahn ''subsequently agreed with Geske to police its property so that its property would not be used as a platform by other persons to injure Geske;'' or Geske's assertion in its opening brief (at 14 fn. 14) that Geske dropped Melahn from Geske's third amended complaint ''after Melahn learned that Local 150 had been impermissibly picketing on Melahn's property.'' Although not probative of the truth of the report Lori's affidavit of September 5–6, 1991, in the state court record, that Geske employee Dave Schroeder told her that the pickets had advised him of Melahn's permission, indicates that Geske had some reason to suspect that such permission had been granted. Indeed, Geske's third amended verified complaint in the state court proceeding, which added Melahn as a defendant, alleged that about September 11, 1991, Geske notified Melahn that the presence and actions of most of the other defendants were ''a tortious interference with [Geske's] contractual relations. Despite this notification . . . Melahn continued to allow'' most of the defendants to use its property and facilities.

[12] As discussed infra, the parties are in dispute as to whether unions in addition to Locals 150 and 301 picketed during this period and whether Local 150 stopped picketing after 30 days.

[13] He testified that the pickets made these records in order to assist the Department of Labor in making a prevailing wage investigation.

sons, I credit Larry's and Coss' denials that this conversation took place.

In an affidavit dated September 5–6, 1991, in connection with the state court trial, Lori stated as follows: On August 19, 1991, she saw a number of cars parked across the road from the Geske plant, with pickets standing in front of them. She ''confronted'' a couple of the pickets and asked what they were doing there. She videotaped them and their license plates and cars to attempt to identify them. Teamsters Local 301 Business Representative Bud Layoff came over, introduced himself, gave her his card, and said that he had known both Senior (her father) and Larry (her uncle) for years. A few minutes later, Layoff went over to the truck of a customer (Parking Lot Services) that was pulling up to the pickets, and had a conversation, much of which she could not hear, with the driver, who after some hesitation drove in at Lori's encouragement. Lori then asked Layoff what he had said to the driver. Layoff said he had told the driver to go to Curran, that asphalt was 50-cent cheaper at Curran. Layoff went on to say that this was ''just one of the tactics we use,'' and that he had told his ''boss,'' ''[I]f you're gonna try to take down Geske's you're gonna have to stay in for the big haul. We're gonna be here for a long time.''

On September 12, 1991, Lori testified at the state court trial to the following effect: On August 19, 1991, she met Layoff, for the first time, when she was taking pictures in the road in front of the asphalt plant. He approached her with his business card and asked who she was. When she identified herself, he said that he had known her father (Senior) and her uncle (Larry) for years, that ''they'' (inferentially, Teamsters Local 301) were not out there to do any harm, and that he was ''just having a good time, having fun.'' He said that his ''boss'' had told Layoff to stand there, and that Layoff had told his boss, ''If you intend to take down Geske's you're going to be there for a long time.'' The two continued to converse until the truck of a customer (Parking Lot Services) pulled up, whereupon Layoff walked away and approached the driver. Their conversation ''pretty much stopped'' after she approached them. She told the driver to drive into the plant, that he did not have to talk to Layoff. After the driver had pulled into the plant, and left with a loaded truck, she asked Layoff what he was telling Geske's customers. Layoff said that he was telling them to go to Curran, a Geske competitor, to get their asphalt; that ''that was just a tactic that they use.'' After August 19, ''W. Cartage Company''[14] stopped delivering hot cement to Geske because their drivers, who are represented by Teamsters Local 301, would not cross the picket line.

Bud Layoff, who is the vice president and business agent of Teamsters Local 301, testified before the state trial court on September 25, 1991, to the following effect: On August 19, 1991, he met Lori halfway in the street in front of the Geske plant. He asked who she was. She told him. He gave her his name and business card and said he had known her family for years. She asked what he was doing there. He said that he was just enjoying life and having a good time. He did not say that he was going to take down Geske, or that he was going to be there a long time if someone was trying to take down Geske. On a couple of occasions, he told ''a couple [of drivers] that came through there with Geske's drivers . . . to go to Curran and get it 50 cents a ton cheaper.''

On September 24, 1991, Geske driver Ron Coss testified at the state court trial that on August 19 or a few days later, pickets carrying Local 150 signs stopped a Lake Zurich truck and talked to the driver. He was not asked what the driver did after this conversation. On September 13, 1991, Manuel Torres testified in English at the state court trial as follows: He owns Lake Zurich Blacktop Company, a paving company that has been doing business with Geske for 13 years. On August 19, 1991, two Lake Zurich trucks that he had sent to Geske earlier that day to pick up material returned empty. When Torres telephoned Geske Plant Operator Schroeder to find out why, Schroeder said that Geske was operating but ''maybe . . . some people out there in the entrance'' had refused to let the Lake Zurich trucker in. Torres thereupon drove his car to the Geske plant, followed by his two Lake Zurich trucks, each of them driven by a driver who could speak no English at all. Someone with a beard, whose name Torres could not remember, told Torres, ''Don't go by Geske's, just Curran, because I want to put [Geske] in a strike.'' Thereafter, Geske loaded both Lake Zurich trucks. On August 23, with Torres' at least implied permission, the bearded man came to Torres' house, and asked why Torres did not buy from Curran. Torres said that the last time Curran had quoted a price to Torres, the quoted price was $20 a ton, and that Torres was presently paying Geske $19 a ton. The bearded man said that Curran was now charging $18.50 and again urged Torres to go to Curran. Torres asked how long Curran was going to charge that price. In April 1991, the most recent date on which Torres bought asphalt from Curran, Curran charged $20 a ton; and Curran had never advised him that Curran had reduced its price. (At the state court trial, counsel for both Geske and Local 150 identified the man with the beard as Local 150 Business Representative Gary Laney. Laney did not testify before me, but did testify for Geske at the state court trial. He was not asked about this incident.)

Operating Engineers Local 150's business representative, Michael J. Quigley, testified at the state court trial that on August 28, 1991, Curran's superintendent told him that Curran's price for asphalt was between $19 and $20, depending on the type of job being bid.

On September 21 and 24, 1991, Tigger testified at the state court trial to the following effect: On August 19, 1991, in the presence of Local 150 Business Agent Chuck August, a white-shirted man with a mustache whose identity Tigger did not know waved down an empty Lake Zurich truck, which had come to pick up asphalt at the Geske plant and was on Geske property. The white-shirted man jogged across the street and jumped on the passenger's side of the truck, which either had stopped (Tigger's initial version) or was moving slowly (his later version), stuck in his head, and talked to the driver. Tigger told the white-shirted man to go back across the road. The white-shirted man said that the driver wanted to talk to him. Tigger said that the driver did not speak English and did not want to speak to the white-shirted man. The white-shirted man said that he wanted to talk to the driver. Tigger asked the driver whether he wanted to talk to the white-shirted man. The driver raised his palms upward, and pointed at the plant. The white-shirted man

[14] She may have been referring to W. Smith Cartage (see supra, part III,B).

called Tigger an obscene name, and walked back across the road. The Lake Zurich driver then picked up asphalt at Geske's facility. Later that day, Lake Zurich trucks drove into the Geske plant and were loaded with asphalt.

On September 23, 1991, John McKelvey testified at the state court trial to the following effect: He is a truckdriver for Geske. On August 19, he saw a picket stand in front of a truck that is owned by Wicks and was about to enter Geske's plant, motion it to stop, and then talk to the driver, who did not turn the truck around. Also on August 19, a truck belonging to Geske customer Knight Paving was asked to stop outside the Geske facility. ''A man'' talked to the driver, who thereafter came on in. On that same day, McKelvey drove a Geske truck to the premises of Vulcan and Meyer, both of them Geske suppliers (see infra, part III,E,J,P). In each instance, someone thereupon raised a picket sign near the pile of material from which the supplier was to load the Geske truck, whereupon the supplier's personnel refrained from loading the Geske truck. When driving from Vulcan to Meyer, McKelvey noticed that he was being followed by a car, whose driver he could not see because of early morning darkness, but McKelvey evaded him before reaching Meyer. Thereafter, McKelvey's truck was frequently followed to the job.

E. *Alleged Events about August 20, 1991*

Tigger testified on September 21 and 24, 1991, at the state court trial that on August 20, 1991, Local 301 Business Representative Layoff waved down a Knight Paving truck, which had driven to the entrance of Geske's facility, and went over to talk to the driver, who thereafter drove into Geske's facility. Tigger further testified that he had seen somewhat similar incidents on three or four other occasions, not necessarily involving Knight, during about two of which the picket mounted the running board to talk to the driver. In addition, Tigger testified at the state court trial that on an undisclosed number of occasions, whose dates he was not asked to give, he saw Knight Paving being followed from Geske premises by persons who he believed were associated with the pickets.

The parties to the proceeding before me stipulated that at all times material, Vulcan Materials Company and Geske have had a contract by which Vulcan promised to provide Geske with materials at a certain price, and Geske promised to purchase and pay Vulcan for these materials. On September 26, 1991, James Urbas testified at the state court trial that he is Vulcan's manager of administration for human resources for the midwest division, and that Vulcan is a party to a number of collective-bargaining agreements, including agreements with Operating Engineers Local 150, Laborers Local 681, various other Laborers affiliates, and various Teamsters affiliates. Urbas testified that Vulcan's contract with Local 150 permits union officials access to Vulcan's property for purpose of contract maintenance (but ''with a lot of limitations as to what a union official can do and can't do in our pits or our places of business''), but further provides that Vulcan does not have to permit on its property picketing which is contrary to law.

On September 23, 1991, Michael Hurst testified in the state court trial that he is the superintendent of the Crystal Lake sand-gravel operation of Vulcan Materials Company, and that Geske has an agreement with Vulcan to purchase gravel from its Crystal Lake yard.

On September 24, 1991, Geske driver Coss testified at the state court trial that during the first week of the picketing, when he pulled up at Vulcan's pea gravel pile to get loaded, ''two guys in a car,'' which bore a Local 150 sign came over, whereupon the Vulcan loader said that he could not load Coss' truck.

On September 23, 1991, Tigger testified at the state court trial to the following effect: On August 20, 1991, Local 150 Representative Lester followed Tigger when he was driving a Geske truck to the pea gravel pit at Vulcan's facility. When they arrived, Lester climbed onto the loader, talked to the operator, dismounted the loader, and then took an ''on strike against Geske'' sign from his car and stationed himself, with the sign, about 5 feet away from Tigger. Although Tigger had placed his truck in a position to be loaded, Vulcan's loader backed out and left. After waiting 5 or 10 minutes, with Lester still standing there holding his sign, Tigger drove out without getting loaded. That same day, Tigger saw another Geske truck, being driven by Geske employee Hansen, at a different pile of pea gravel at Vulcan's facility. Teamster Local 301 Business Agent Layoff was holding an ''on strike at Geske'' picket sign, and Hansen did not get loaded. When Tigger drove back from Vulcan's facility to Geske's shop, he was followed by Lester, who continued to drive along the road after Tigger pulled into the shop.

On September 12, 1991, Lori testified at the state court trial to the following effect: About August 20, 1991, she and Tigger drove in a Geske truck, and Geske employee Hansen drove another Geske truck, from the Geske plant to Vulcan's facility. These trucks were followed from the Geske plant by a car or cars. When the Geske trucks arrived at Vulcan, an individual who was in a following car leaned a ''Strike'' sign upside down against his car, climbed up on the loader, said something to the loader operator, and came back down, whereupon the loader operator turned off his loader and would not load the trucks. The Geske trucks were not loaded at Vulcan.[15] Thereafter, Vulcan tried to deliver to Geske, but Vulcan's truckers would not cross the picket line. Since August 20, 1991, Geske had done no business with Vulcan, which was Geske's principal supplier of aggregate and with which Geske has done business for years. Also on August 20, ''W. Cartage Company,''[16] with which Geske had a regular agreement to supply Geske with hot asphalt, ceased bringing such hot asphalt because their drivers, who are represented by Teamsters Local 301, refused to cross the picket line at Geske. On and after August 20, five or six cars belonging to ''congregants who are part of the picketing group'' have been parked near the Geske facility and following Geske's trucks.

On September 25, 1991, Geske truckdriver, Hansen, testified at the state court trial to the following effect: About August 20, 1991, he drove an empty semi, bearing Geske's name, from Geske's facility. He was followed at a 5-foot distance by a car occupied by Teamsters Local 301 Business Agent Layoff. When Hansen pulled up to a pea gravel pile at the Vulcan facility, about 1-1/2 miles from Geske's facil-

[15] An affidavit signed by Lori on September 5 and 6 in connection with the state court proceedings describes this or a similar incident. Her affidavit describes a conversation, outside of her hearing, between Layoff and the picket while these events were going on.

[16] See supra, fn. 14.

ity, the car that had been following him pulled up next to Hansen's semi. Layoff grabbed a ''Strike'' picket sign, and stood next to the driver's side door with his hands resting on top of the sign. Vulcan's loaders in the area failed to follow the practice, which they usually followed when Hansen drove an empty truck near the pea gravel pile, of coming over and loading the truck. While Layoff was standing next to the cab, Hansen asked him ''what they were doing;'' Layoff replied that ''they were organizing.'' Hansen further testified that at that same time, Tigger had driven another Geske truck to another pea gravel pile at Vulcan, that someone was holding a ''strike'' sign near Tigger, and that the Vulcan loader pulled up to load Tigger but left after being addressed by the man holding the sign. Layoff stayed at Vulcan's premises when Hansen left.

On September 26, 1991, Mike Geske testified before the state trial court that on either August 20 or 21, when an empty Performance Paving truck approached Geske's facility to buy asphalt from Geske, Local 150 Business Representative Lester held a picket sign at the right front fender, whereupon the truck left without purchasing asphalt from Geske. According to Mike, Local 150 Business Representative Chuck August and Local 301 Business Representatives Layoff and Haffner were present on this occasion. Mike further testified that after that day, Performance Paving continued to be a regular customer of Geske while picketing was going on.

On September 24, 1991, Geske truckdriver Coss testified at the state court trial that on five or six occasions since August 19, he had been followed when he drove a Geske truck from Geske's facility. Coss testified that on August 20, Laborers Local 1035 Business Agent Gerald Bauman (also referred to in the record as Bowman, Baumann, and Rowman) followed him ''pretty close'' and ''pretty fast'' in a black pickup truck on a 10-minute drive to the Crystal Lake High School job, where Bauman parked his truck.

F. *Events on August 21, 1991*

At 4:30 or 4:45 a.m. on August 21, 1991, Operating Engineers Local 150 Business Representative Chuck August came down to the picket line at Geske, made breakfast on the picket line, and shared it with some of Geske's employees. At about 9:15 a.m., while he was talking to what August testimonially referred to as two Geske ''employees'' (see infra, fn. 18) at the entrance to the plant, someone from the other side of the road said, ''[H]ere she comes.'' The employees to whom August was talking ran away from him. Lori pulled in, stopped the two employees (calling back one who was still trying to get away), pointed her finger at them, and said that she did not want them talking to August. She further said, ''I want to know if you sign'' followed by something else that August did not hear. Then, she looked over, saw that August was looking at the group, and said something he did not hear.

About 10 or 15 minutes later, she came into view of the entranceway, near which August was still standing. She came up to him and ''demanded to know'' if any of the employees signed anything with August. He said that it was not her privilege to know. She said that she had directed the employees not to even talk to August.[17] She said that August had no right to be there, and told him to ''get out of here.'' August said that he had every right to be there, and told her that if there were any problems at all on the picket line, even foul language, he would like to know about it and would get it corrected. He wrote his home phone number, beeper number, and car number on one of his business cards, which show his business number, and gave the card to Lori. She took the card, told him to get out of there, and started walking back to her car. August walked across the street to the other picketers. She came back over, took one of the picket signs out of the ground, threw it across the street, got back into her car, and drove away. The picket sign in question was not on Geske property. After she left, August put it back at the place from which she had removed it.[18]

G. *Alleged Events on August 22, 1991*

1. Mike Geske and the picket sign

As previously noted, Mike Geske is Larry's son. Mike is employed by Geske as a truckdriver. On August 22, 1991, he stopped his truck at the entrance to Geske's plant, got out, and kicked over a Local 150 picket sign that was stuck in the ground near the plant entranceway but on conservation district property. After unsuccessfully trying to break it, he put it into his cab and drove it into the yard. Local 150 Business Representative August walked over to the entranceway waiting for Mike to come back out so August could retrieve the sign. After dumping the load, Mike drove out the entranceway. Then, August asked Mike to return the sign. Mike said that he had no use for the sign. August said that he wanted the sign back. Then, August told Geske employee Ron Coss, who had been observing the entire incident, that August was going to have to get the sign back from Mike. August went on to say to Mike, ''[Y]ou don't have to put a scene on for your employees . . . just do yours and we'll do ours.'' Mike told August to keep the signs on his own side of the road. August said that Mike did not own that side of the road, and that the signs were on conservation district

[17] Because Lori was admittedly Geske's agent and supervisor, I find no merit in Geske's contention (reply Br. 24) that her statement in this respect (to which August credibly testified) was hearsay. *Oklahoma Installation Co.*, 309 NLRB 776, 779 (1992). In any event, Geske's failure to raise this objection at the time August gave this testimony forecloses such an objection now. *American Rubber Co. v. NLRB*, 214 F.2d 47, 52–53 (7th Cir. 1954); *Today's Man*, 263 NLRB 332 (1982); *Advance Transportation Co.*, 300 NLRB 567, 572 fn. 7 (1990), enfd. 979 F.2d 569 (7th Cir. 1992).

[18] My findings about this incident are based on Chuck August's credible testimony before me. Lori testified before me that on that day, August 21, in Chuck August's presence, she took out of the ground a picket sign that was on Geske property. She further testified that it was August 12 and not thereafter when Chuck August gave her a business card, that during this conversation Geske's personnel Dave and Ron Schroeder (whom in a prior affidavit she had described as ''employees'' who were ''loader/operators'') were present, that she had no conversation with the Schroeders on August 21 in which she asked them whether they had signed anything, that on August 21 she did not tell Chuck August he had no right to be there, and that she never demanded from Chuck August or any other Business Representative of Local 150 whether any Geske employees had signed with the union; see supra, part III,C. For demeanor reasons, I credit August.

property. Mike returned the sign to August. As the truck was pulling out, Mike raised his middle finger.

The General Counsel adduced the foregoing evidence to support her contention that Geske filed and maintained the state court lawsuit with a retaliatory motive. I discuss infra, (part III,V,2), Geske's contention that Mike Geske's conduct is nonprobative of such motive because he allegedly is not an agent of Geske.

2. Alleged following of Mike Geske by Local 301 Business Agent Layoff

On September 26, 1991, Mike Geske testified at the state court trial that on August 22, Local 301 Business Agent Layoff followed Mike's semi from the Geske asphalt plant part of the way to the Charles Lee gravel pit in Belvidere, where Mike picked up a load of chips. Before the picketing began, Geske had usually bought its chips at Vulcan, which is 25 miles closer than Lee to Geske's facility but whose employees were refusing to cross a picket line or work beside a picket sign.

3. Alleged following of Tigger by Local 150 Business Agent Quigley

On September 24, 1991, Tigger testified at the state court trial to the following effect: On August 22, 1991, he drove a Geske truck from the Geske facility headed for the Charles Lee gravel pit in Belvidere. His testimony suggests that Lori accompanied him in the truck, but this is unclear. Tigger was followed by Local 150 Business Representative Mike Quigley. When Tigger reached the town of Marengo, which lies between the Geske facility and Belvidere, he pulled over onto the shoulder of the road, whereupon Quigley passed him, made a left turn into a parking lot across the road, and parked his car there. Then, a Marengo policeman came over to Tigger's truck; Tigger's initial testimony suggests that the policeman came over at the request of Lori and Tigger, but he later testified that the policeman came over because he saw Lori and Tigger taking photographs. On seeing the policeman approach Tigger, Quigley walked over and introduced himself as a representative of Local 150. Tigger said Quigley was following him. Quigley said that this was true, and that ''[w]e are on strike against Geske's. If we are following, we are simply going to cut them off . . . We are on strike against Geske.'' Lori said that ''it was an illegal strike.'' Quigley said that it was a legally sanctioned strike. The policeman said that Quigley could follow Tigger; that Tigger should let the policeman know if Quigley gave him any traffic problems; but that there was nothing the policeman could do about Quigley's following Tigger. When Tigger resumed his journey, Quigley followed him into Belvidere, and directed an obscene gesture to Tigger before turning away.

Lori testified before both the state court and me, but was not asked about this alleged incident. On September 26, at the state court trial, Quigley denied following Geske trucks, denied following a Geske truck to Belvidere, denied that he was stopped by the police, and that a police report was made while he was following the truck. Neither Tigger nor Quigley testified before me.

H. *Geske's Initial Unfair Labor Practice Charges Against Operating Engineers Local 150 and Teamsters Local 301*

On August 23, 1991, Geske, through Lori, filed three charges against Operating Engineers Local 150 and one charge against Teamsters Local 301. The charge against Local 301 (Case 33–CC–1053) alleged that Local 301 had violated Section 8(b)(4)(i) and (ii)(B) of the Act since about August 10, 1991, in that

> Local 301 has through picketing and threats, coerced and restrained [Patching], Geske & Sons, Inc., Geske's customers, acting in concert with Op. Engineers 150 . . . where in each case, their object is to put pressure on Geske or customers of Geske to stop doing business with Geske, or change the way they do business with Geske through direct threats to persons in commerce and through picketing with an untruthful sign, the signal effect of which is to falsely cause employees of neutrals to believe that the Union is on ''strike'' when in fact, the Union does not represent any employees of Geske and has never represented any employees of Geske. By these and other acts, [Local 301] has violated Section 8(b)(4)(i) & (ii)(B).

One of the charges filed by Geske that day against Operating Engineers Local 150 is virtually identical to the above-quoted charge, except that the respective references to the two locals are interchanged. Another charge filed by Geske against Operating Engineers Local 150 on that day (Case 33–CC–1054–2) alleged that since about August 10, 1991, Local 150 had violated Section 8(b)(4)(i) and (ii)(A) in that Local 150 ''threatened and coerced [Geske] through picketing and threats where an object was to force or require Geske to enter into an agreement [prohibited] by Section 8(b)(4)(i) & (ii)(A).'' A third charge filed by Geske that day against Operating Engineers Local 150 (Case 33–CE–18) alleged that about August 12, 1991, Local 150 ''entered into an agreement prohibited by Section 8(e) with Geske and Sons, Inc. and entered into similar agreements with other employers in the last six months to change the way they do business or stop doing business with [Patching]. By these and other acts, [Local 150] has violated Section 8(e).''

I. *Alleged Events on August 26, 1991*

1. The alleged city of Crystal Lake incidents

On September 26, 1991, Mike Geske testified at the state court trial that on August 26, when Geske was performing a paving job for the city of Crystal Lake, Laborers Local 1035 Business Representatives Bauman and Monroe Smith Jr., and Local 150 Business Representative Angel Delrivero, pulled up at the job and repeatedly repositioned their cars so that they were always where Mike was operating the paver. Mike further testified that Delrivero took pictures of Geske personnel with a videocamera; and that when trucks entered or left, all three union representatives wrote on legal pads. Mike went on to testify that when he moved his paver that day to the next job, Local 1035 Business Representative Bauman followed him there by truck.

On September 23, 1991, McKelvey testified at the state court hearing to the following effect: On August 26, 1991,

Bauman followed McKelvey when he drove his Geske truck from the Geske facility to a paving job in Crystal Lake. When McKelvey reached the jobsite at about 8 a.m., he found that Local 1035 Representatives Bauman (who was writing something down) and Smith, and someone whom McKelvey identified as ''Angel,'' were there. McKelvey further testified that on a date he could not recall, ''Angel'' followed one of Geske's trucks to the ''Wicks'' or ''Wicker'' subdivision, and then pulled over and sat there the rest of the afternoon, ''moving from street to street, right along with us,'' and writing something down. Also, McKelvey testified that on several other occasions during a period when Local 150's signs were up, Bauman followed him at a normal distance.

Robert Bergstrom testified at the state court hearing on September 23, 1991, to the following effect: Until August 26, 1991, his employer, Wicks Blacktop, was a Geske customer. On that day, he and Bob Moran, who is Wicks' owner, drove a truck to the Geske plant to pick up some asphalt. When the Wicks truck reached the entrance to Geske's plant, Bergstrom saw about eight men standing on the other side of the road watching the Wicks truck. As the truck was making its turn into the Geske plant, Operating Engineers Local 150 Business Representative Chuck August, who was the only individual standing on that side of the road, stepped in front of the truck on the driver's side, held up his arm to stop the truck, and said, ''We are on strike here'' (Bergstrom's initial version) or that ''he was on strike'' (Bergstrom's version on cross-examination). Moran asked, ''Do you own the plant?'' (Bergstrom's initial version) or who owned the plant (Bergstrom's later version). August said, ''We do. The operators own the plant,'' and wanted to be in the union. He went on to say that Wicks should go to Curran (also spelled ''Kern'' in the record) and, in response to a question from Bergstrom or (more likely) Moran, said that Curran would take Wicks' checks and give it credit. The Wicks truck drove into the Geske plant, picked up 4 tons of asphalt, and drove out of the plant without stopping. So far as Bergstrom knew, Wicks had not thereafter done any work with Geske. Price is a factor in deciding to buy asphalt, and all the plants, like Curran and Geske, have about the same price.

August testified before me that on this occasion, ''Quite possibly, I could have'' stated, ''We're on strike here.'' Also, he testified before me that ''I believe I did'' say to drivers who approached the picket line that ''[t]he operators here want to go union.'' He further testified before me that on occasion, when drivers who wanted to honor the picket line at Geske asked if there was a place nearby where they could get asphalt, he suggested that they go to Curran, which was the closest asphalt plant, and ''Rick'' would set them up.

2. The alleged incident involving the ridge

On September 24, 1991, Tigger testified before the state trial court to the following effect: On August 26, Tigger parked a Geske truck on the road in front of Geske property and took from inside the truck photographs of various persons whom he believed to be associated with Local 150 and who were on a ridge, which he believed was owned by Geske, and which is about 250 feet behind a conveyor that goes up to Geske's asphalt plant. After taking these photographs, he was approached by Chuck August, whom Tigger told to keep ''his guys'' off the ridge. August said that he thought these men were on the property of an adjacent landowner, Jimmy Veugeler, who had given them permission to be present. Tigger said that these men had been on Geske's property, not Veugeler's; said that Tigger would call the police if he saw them on the ridge again; and further said that he would check with Veugeler to see if they had permission to be on Veugeler's property. August told Tigger to go ahead, and asked who Tigger was, but Tigger did not tell him. August introduced himself and gave his card to Tigger. Tigger went on to testify that August ''told me I wouldn't have to worry about my mother or my sister . . . he didn't want to hurt us.''

J. *Alleged Events on August 27 and 28, 1991*

Monroe Smith Jr. testified at the state court trial on September 23, 1991, to the following effect: He is employed by Laborers Local 1035, which is a member of the McHenry County Building Trades Council. The other members of the McHenry Council include Operating Engineers Local 150 (whose delegate to the Council is Chuck August), Teamsters Local 301 (whose delegates to the Council are Layoff and Haffner), and Electricians Local 701. At a meeting of that Council (to which Smith is a delegate from Laborers Local 1035) in the morning of August 27, 1991, it was mentioned that a picket had been set up at Geske. Later that same day, Smith went to the Geske facility to see what was happening. When he did so, he saw August, Layoff, Haffner, and 9 to 11 unidentified persons from the ''electricians,'' the ''painters,'' and other unions; all of these individuals had attended the Council meeting earlier that day.

On September 26, 1991, Mike Geske testified at the state court trial that on August 27 or 28, in the presence of Chuck August, Mike and Tigger asked Local 301 Business Representative Layoff ''what business it was of his to shut us off on material at Vulcan or interfere with our ability to obtain materials,'' to which Layoff replied, ''Well, my boss told me to go out here and support 150.''

On September 21 and 24, 1991, Tigger testified at the state court trial to the following effect: On August 28 or 29, Local 150 Business Agent Mike Quigley drove his car, which had been parked at Melahn's, to a point about 30 feet in front of a truck that was owned by Lyman Martin Cartage Company and was on the conservation district road with a load of chips for Geske from Vulcan. Quigley parked his car alongside the truck but facing in the opposite direction, got out, talked to the truckdriver, and then drove back to the Melahn property. The Lyman Martin driver turned around, went to the end of the road, talked on his radio, and then headed back toward Route 14 without making a delivery.

On September 23, 1991, Allen R. Miller testified before the state trial court to the following effect: Miller is aggregate manager for Meyer Material Company (Meyer), which sells materials, including pea gravel, which are used in making asphalt. On August 28, 1991, three Geske trucks came to the Meyer facility to purchase and pick up pea gravel. At about 7 a.m., after the Geske drivers had loaded two of the trucks, Teamsters Local 301 Business Representative Haffner put up a ''roving picket'' and told Miller that if Meyer continued to load Geske trucks, Haffner would put up a picket at Meyer's only front gate and picket Meyer's entire oper-

ation. In consequence of this conversation, Geske's third truck drove off without being loaded, and Miller told Haffner that Meyer would not load any further Geske trucks from Meyer's pea gravel hopper. Approximately 15 or 20 minutes later, while Haffner was standing next to Miller, an unnamed individual approached Miller with the representation that he was a representative of Local 150; there is no other evidence that he was such a representative. Miller stated that in the future, Geske trucks would not be loaded from Meyer's pea gravel hopper, whereupon the unnamed individual said ''Okay'' and left. Between that date and the date Miller testified, Meyer had not to Miller's knowledge loaded Geske with any further products.[19]

K. *Events on August 29, 1991*

Arrangements for a conference on August 29, 1991, were confirmed by Operating Engineers Local 150 Business Representative Chuck August with Senior, who requested that it be held in the evening when he finished work, at 7 or 7:30 p.m.. At 7 p.m., August and Teamsters Local 301 Representative Layoff went to Geske's yard (4 or 5 miles from the plant), where they were met by Lori, Tigger, and Mike. The Geskes ushered August and Layoff into a coffee room, and asked why they were there. August said that they were there for a meeting with Senior.

August credibly testified before me to the following effect: ''[T]hey said, no, you have to meet with us. You're dealing with us. I said, [we] would like to wait for [Senior]. Lori told me that we had to meet with them.'' August said that he and Layoff would not talk about the matter until Senior arrived. Then, Lori told them to leave. They left the building and went to stand by their cars, which were parked in Geske's parking lot. After the two business agents had stood there for about 10 minutes, waiting for Senior, ''Lori, Mike and Tigger came out to us, approached us. And they said, you have to deal with us. My father is not going to be here. You have to deal with us.'' August said that he had thought Senior was going to attend the meeting. ''They'' said that ''you'' had no right to be out there to picket. August ''said, yes we do. We have every right. They said, why are you doing this to us. I said, because we have the right to go after recognitional picketing.'' Lori asked August and Layoff, ''are you proud of what you do?'' August said that he was, that he was proud of trying to provide a wage and benefits for the working man. Then, she asked Layoff, ''how can your children be proud of what you do?''[20] The record fails to show Layoff's reply, if any. Tigger asked August what ''we'' could do to get this resolved. August said that he had to talk to Senior. Tigger said that Senior was telling ''us'' to handle it, and asked, ''what if we gave everybody raises?'' August said that this would be a step in the right direction. Tigger asked whether raises would take the pickets down. August said that he needed to talk to Senior. Tigger said, ''we know who the worthless buttholes are that brought the union in.''[21] After some further discussion between August and Tigger, August suggested that they move away from Mike, Lori, and Layoff, the heated conversation between whom was getting louder. After August and Tigger moved away, Tigger again asked what it was going to take to get the picket signs down. August said that he had to talk with Senior, and that Senior had promised in Tigger's presence to attend the meeting. Tigger said that ''those worthless buttholes are going to get theirs.''[22] Lori then walked over and told August to leave. He said that he was waiting for Senior, that Senior had told August to be there. She said four or five times that August had to leave ''now.'' Tigger told her to go into the shop, and told August that Tigger was going to talk to Senior and try to set up another meeting. Geske's employees at the yard were in full view of these events, but the record fails to show what, if anything, they could hear.[23]

L. *Alleged Events About September 1, 1991*

On September 24, 1991, Tigger testified to the following effect: About September 1, Chuck August jogged across the road to a Tim's Excavating truck, which had pulled on the road with its front pointed toward Geske's plant; stepped up on the passenger's side of the truck; and stayed there about 2 minutes. Then, the truckdriver drove into Geske's property, drove over to Tigger, and asked whether Geske's plant was open, to which Tigger replied ''yes.'' The truck thereupon drove up to get loaded.

M. *Alleged Events About September 4, 1991*

On September 25, 1991, Jon Hansen testified at the state court hearing to the following effect: Hansen is employed by Geske as a truckdriver. About September 4, 1991, when he

[19] The record before me contains an ''amended affidavit,'' executed by Miller, which makes much the same assertions as his testimony; this ''amended affidavit'' was executed on September 10, 1991, several days after Judge Haskell Pitluck issued the temporary restraining order on September 5, 1991. The record before me also contains a photocopy of an unsigned document captioned, ''Affidavit of Allen Miller;'' this document calls for a notary's signature on an unspecified date in September 1991. Company Counsel Avakian stated on the record that the original copy of the latter document (which is consistent with Miller's testimony) was in fact signed on September 5, a representation which was accepted by counsel for the charging party but not by the General Counsel. Avakian also stated that the state trial court probably still had this at least alleged September 10 document under seal. Company Counsel Smetana stated to the state trial court on September 20, 1991, that ''The affidavit under seal is the affidavit that shows the emergency need why the TRO had to be issued at that time [and] indicates the nature of what happened in terms of the one supplier that was still able to supply [Geske] and the threats that were visited upon that supplier by the Defendants herein.'' On September 23, 1991, after Miller had testified, Smetana permitted counsel for Locals 150 and 301 to examine the affidavit by Miller which was under seal. During a subsequent colloquy, Judge Sullivan stated, in effect, that the affidavit referred to by Smetana was the alleged September 5 ''affidavit,'' and that both Miller ''affidavits'' were in court files as if they had both been received under seal.

[20] Lori's and Layoff's children attended the same school.

[21] At the state court trial, Tigger, who did not testify before me, in effect denied so describing union representatives. I regard this cold record as insufficient to warrant discrediting August's testimony before me about Tigger's language, buttressed as such testimony is by August's demeanor.

[22] See supra, fn. 21.

[23] Lori testified that after August asked to talk to Senior, she replied that Senior ''wasn't going to be able to make it. And he was welcome to talk to us, Mike and [Tigger] and myself were present.'' She denied demanding at that point that August leave. For demeanor reasons, I credit August.

drove an empty Geske truck from Geske's premises to get a load of goods from the Charles Lee gravel pit about 40 miles from Geske's facility, Local 150 Business Representative Delrivero followed Hansen at a distance which varied from 2 to 10 feet. When Hansen stopped in the Lee pit, Delrivero stopped at a point about 50 yards from Hansen and at least 250 yards inside the entrance and pulled out an Operating Engineers Local 150 picket sign. Delrivero left Lee's premises when directed to do so by Lee representatives who told him he was trespassing. On about the same date, Hansen saw a Geske customer, Parking Lot Service, being followed by a car about 10 feet behind Parking Lot and with a license plate stating, ''Haffner;'' as previously noted, one of Teamster Local 301's business representatives is named Mike Haffner.

On September 26, 1991, Mike Geske testified at the state court trial that on September 4 or 5, Local 150 Business Agent Bill Rucker followed him by car, at a distance of 30 feet, when Mike drove a semi loaded with asphalt from the asphalt plant to a Geske paving job.

N. *Geske's Initiation of the Lawsuit on September 5, 1991*

On September 5, 1991, Geske commenced a lawsuit in the Circuit Court of McHenry County, Illinois, County Department, Chancery Division, against Operating Engineers Local 150 and Teamsters Local 301. The original complaint was signed by Attorneys Samuel J. Diamond, whose office is in McHenry, Illinois, and Gerard C. Smetana, whose office is in Chicago, Illinois. A copy of the original complaint, which is 11 pages long, was served on Local 150's counsel at his office in Chicago at 4:50 p.m. on September 5.[24] Attached to this complaint were the affidavits by Lori and Senior summarized supra (part III,C,D), and an affidavit by Miller (see supra, fn. 19). The proceeding was held about 70 miles from Chicago, and neither Local 150 nor Local 301 was represented by counsel. Just before the proceeding began, Geske counsel made certain handwritten changes in the original complaint.[25] In addition, the heading, which in typewritten form stated, ''Verified Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions, and Damages,'' was amended by inserting a handwritten ''Amended'' after the word ''Verified.'' This complaint as amended included allegations that Locals 150 and 301 had engaged in trade libel against Geske, and tortious interference with Geske's contractual relations and prospective advantage, in connection with incidents involving Patching, Lake Zurich Blacktop, All-American Asphalt Maintenance, Tim's Excavating Company, Performance Paving, and Charles Lee & Sons. The complaint sought ''judgment against Defendants in an amount to be proved at trial, together with the costs of this lawsuit, attorneys' fees, and such other relief as this Court deems just and proper.'' Also on September 5, Geske counsel filed with the state court, and inferentially served on Local 150's counsel along with the original complaint, a document captioned, ''Plaintiff's Motion for Temporary Restraining Order and Preliminary and Permanent Injunction.'' At 6:58 p.m. on September 5, Circuit Court Judge Haskell Pitluck issued a temporary restraining order, which was drafted by Geske's counsel and was to expire by its terms at noon on Monday, September 16. The order enjoined Operating Engineers Local 150 and Teamsters Local 301 from ''(1) physically blocking ingress and egress of [Geske's] employees, customers and suppliers to and from [Geske's] facility; (2) threatening [Geske's] employees, customers and suppliers; (3) publishing false and misleading statements, oral or written, about [Geske] to [Geske's] employees, customers and suppliers and to the public at large, including but not limited to placards, signs or statements stating that the employees of [Geske] are on strike; and (4) otherwise interfering with the contractual relationships between [Geske] and its customers and suppliers.'' Pursuant to Geske's request, bond was waived.[26]

An affidavit signed by Senior on September 5, 1991, in connection with the state court lawsuit avers that since the picketing began, none of Geske's employees had refused to report to work. So far as the record shows, all of Geske's employees have continued to report to work at all material times.

O. *Alleged Events on September 6, 1991*

On September 6, an individual referred to in the record as Shaws or Schaltz, who is a process server or is connected with the McHenry Country sheriff's department, came to Lori's office, which is far enough from the Geske plant to make driving between them convenient,[27] and stated that he had papers to serve on August. Lori said that August was at the picket line. She drove her car to the picket line, and Shaws followed in his car. When they reached the plant, Shaws gave August, who was standing at the entrance to the property, a ''packet of paperwork,'' which included a copy of the temporary restraining order issued by Judge Pitluck on September 5. As soon as August received the packet, Lori

[24] Smetana's certificate of service attached to the complaint avers that it was served by messenger before 5 p.m. on September 5 on counsel associated with Baum and Sigman, Ltd., and on counsel affiliated with Carmell, Charone, Widmere, Matthews & Moss. Both firms are listed as having a Chicago address.

[25] Among other things, these handwritten changes altered par. 18 by withdrawing the allegation that Local 150 had threatened to boycott Lake Zurich Blacktop if it continued to do business with Geske, by adding the allegation that Local 150 had threatened to damage the property of the ''John Doe Co.'' if it continued to do business with Geske, and by adding the name of All American Asphalt as an employer whose employees had allegedly been blocked by Local 150 from entering Geske's facility to buy asphalt. In addition, a sentence which in its original form alleged that ''Lake Zurich Blacktop, previously one of Geske's biggest customers, has not returned since,'' was changed to read, ''Performance Paving, and American Asphalt, previously one of Geske's regular customers, have not returned since.'' Performance Paving is not elsewhere named in the pleading.

[26] In connection with the absence of counsel for Locals 150 and 301 during the ex parte proceeding, which led to the temporary restraining order, Geske's Chicago counsel, Smetana, stated to the state trial court, inter alia, that ''when I came here at the close of the business day, the papers had been filed by [Geske's McHenry counsel]. We were not sure when or where we would be heard, and we waited for Judge Pitluck until 7 p.m. At that point it was still not clear whether we were going to be heard. At that point it was impractical'' to call union counsel; ''it is not possible to get through to those offices at that hour. We had done everything possible to notify them.''

[27] Her September 5 and 6 affidavit states that these two locations are ''a couple of miles'' apart.

demanded of August that he take down all the pickets, remove himself from where he was positioned, remove all the pickets, and leave right then and there. August said no, that he had time to respond to it, and that he did not even know what he was looking at. Shaws agreed that August had time to respond. Lori demanded that Shaws remove the pickets and have August and the pickets arrested. Shaws said that he had no authority to do that. Lori reiterated that the picket signs had to be taken down ''now, not in ten minutes, now.'' Shaws walked back over, and had a 5- or 10-minute conversation with Lori, whose content is not shown by the record. Then, he left the area. Lori left a few minutes later. As previously noted, the picket signs stated, ''LOCAL 150 ON STRIKE AGAINST GESKE FOR RECOGNITION AS MAJORITY BARGAINING REPRESENTATIVE OF COMPANY'S OPERATING ENGINEER EMPLOYEES.''[28]

On September 12, 1991, Lori testified at the state court trial to the following effect: She saw the process server serve August. The process server ''then returned to our plant'' and notified ''me'' that August had been served. After August was served, he left the plant picket line. She stayed for ''quite a while.'' August returned later that day reading the order, with his reading glasses on, and read it to himself ''for quite a long time.''[29]

An affidavit by Lori dated September 6, 1991, and submitted in connection with Geske's motion that day to amend the temporary restraining order and for sanctions for failing to follow it (see infra, part III,S), avers, inter alia, that in an area opposite Geske's plant, ''One car which has license plates 'Scabby' has an inflatable rat on its roof, the sides of the car read 'Local 150 Rat Patrol.' Suppliers and customers are intimidated by this [and other] activity and many are refusing to cross.'' On September 12, 1991, she testified at the state court trial that such a car, with an inflatable rat about 5-feet high and 5-feet wide, had parked on Melahn property since September 6, and that she had seen the car being driven by Local 150 Business Agents August and Delrivero. Geske driver Hansen testified before the state court on September 25 to having seen this ''Ratmobile'' vehicle during an undisclosed period between August 19 and September 18. On September 29, 1991, Tigger testified at the state trial, in effect, that the ''Local 150 rat patrol car'' was parked on Melahn's premises on September 6.

P. *Events on September 7, 1991, at Vulcan's Premises*

On September 23, 1991, Tigger testified at the state court trial that on September 7, 1991, he and Geske driver Hansen each drove a Geske truck to Vulcan's establishment. According to Tigger, he gave a copy of the September 5 restraining order to one ''Al,'' who runs Vulcan's scale house. Tigger went on to testify that ''Al'' made a copy of the order and said that Geske ''could go get loaded . . . it's not up to him.'' Tigger further testified that he and Hansen backed up their respective trucks to Vulcan's pea gravel pile, where they waited for Vulcan loader Ken Powers to finish some other loading jobs and come over to load the two Geske trucks. Tigger went on to testify that Local 150 Business Representative Lester and ''the big Mexican guy'' had been sitting in a car about 75 feet away, but moved the car to about 30 feet from the pile. Tigger testified that when Powers drove Vulcan's loader over to the pea gravel pile and filled a bucket with gravel, Lester and the ''big Mexican guy'' got out of the car and, with a picket sign, went over to stand in front of Geske's trucks; Lester shook his head at Powers; and Powers thereupon dumped his bucket of gravel back into the pile and failed to load Geske's trucks. Tigger did not testify before me. Mike Geske, who according to Tigger took certain photographs of the incident, testified for Geske before the state court, but not before me; Mike was not asked about this incident. Hansen testified for Geske before the state court and before me, but was not asked about this incident.

Lester and Powers testified before me; and Lester's prehearing affidavit was received into evidence, on Geske's motion, without objection or limitation. I see no significant inconsistencies between his testimony and his affidavit; moreover, although he and Powers testified to certain conversations involving Tigger to which Tigger's testimony did not refer, Lester's and Powers' version of the events is consistent with Tigger's version. A composite of Lester's and Powers' credible testimony and Lester's affidavit shows as follows.

At about 6:30 or 7 a.m., Powers, who was working on Vulcan's loader, heard Vulcan's dispatcher say, on a citizens' band radio installed on the loader, that two Geske trucks were heading towards Vulcan's yard with a court order. This message was also picked up by a citizens' band radio in Lester's car, in which he and Business Agent Rolando Jaimes[30] were parked on Vulcan's property. A minute or so later, at about 7 a.m., two Geske semis—one driven by Tigger and the other by Hansen—arrived at the Vulcan yard, along with a pickup truck being driven by Mike; Lori may have been a passenger in one of these three vehicles. The semis backed into a materials pile in a position to receive materials. Powers proceeded to the materials pile and loaded a bucket of his loader. Meanwhile, on seeing Powers' machine approach the materials pile, Lester drove to a point near the pile, and Jaimes exited Lester's car with a picket sign in hand and proceeded to the front of the Geske semis, in full view of Powers. When Powers (a member of Operating Engineers Local 150) approached the Geske truck and read the sign, he stopped his equipment, emptied the bucket back onto the pile, and backed his equipment away, whereupon Tigger got out of his truck, waved two pieces of paper at Powers, and started to yell at him. Then, Tigger climbed into the cab of Powers' loader, showed Powers the paper, and yelled, ''[Y]ou have to load us now . . . I have this court order and you're supposed to load me. It says you have to load me.'' Lester waved Powers down from the loader. Powers, who up to that point had said nothing to Tigger,

[28] My findings as to the conversation in front of the plant on this day are based on August's testimony. For demeanor reasons, I do not credit Lori's testimony that she was 50 feet away from the Shaws-August conversation and could not hear any of it, or her denial that she asked Shaws for August's arrest or demanded that August take the pickets down. She was not asked about her conversation with Shaws in August's sight but not earshot.

[29] The copy of this order, which is in the record before me, is handwritten, contains crossouts and corrections, and is difficult to read.

[30] On cross-examination, Powers initially identified this man as ''Dean Valento'' and later as ''Orlando.'' Because Lester was likely better acquainted than was Powers with Lester's associate, I accept Lester's ''Rolando Jaimes'' identification.

asked to see Powers' business agent. Tigger said, ''OK,'' whereupon Powers parked the loader, from which he and Tigger descended. Mike, who was operating another Geske truck in the area, and Tigger told Powers that the two papers were restraining orders and Vulcan had to load Geske trucks.[31] After Lester had walked Powers away from Mike and Tigger, Powers asked if the picket was a ''legal picket.'' Lester told Powers that there had been a change of venue on the restraining order from the state to the Federal court (see infra, part III,S), that determining the legality of the picket was Lester's and not Powers' responsibility, and that Lester considered it a legitimate picket. Powers said he understood, and walked toward his loader. Tigger intercepted him, tried to give him the pieces of paper, and said, ''[T]his is a restraining order and by law you have to load me.'' Powers said that he chose to honor the picket sign. He eventually accepted the papers, but returned them to Tigger after Lester told Powers he did not need them and should return them. After Powers had driven his loader away, Mike Geske, who had been videotaping the incident since Powers first approached with the loader, told Tigger that they had what they needed and should leave. The Powers incident was observed by Geske employee Hansen, who had got down from his truck. Tigger, Hansen, and Mike Geske then drove away.

The videotapes taken by Mike Geske were not offered into evidence, either before me, or before the state court.

Q. *Alleged Events on September 13, 1991*

On September 25, 1991, Geske truckdriver Hansen testified at the state court trial to the following effect: On September 13, 1991, two Norgard trucks, which he believed were coming from Vulcan, approached the entrance to Geske's plant. Both of them were carrying material, to be delivered to Geske, which is essential to making asphalt. As the Norgard trucks were about to turn into Geske's entrance, an unidentified man who had been standing with a group on Melahn property walked to a point near the first truck and about 1 foot off from the side of the road, raised his right hand with his straight palm facing away from his face, and waved. Both Norgard trucks stopped, at least one of them partly on the road and partly on Melahn property, and at least one Norgard driver conversed with the waver. Then, both trucks drove away without making a delivery.

R. *Other Alleged Activities By Locals 150, 301, and 1035*

On September 23, 1991, Tigger testified before the state court that 10 to 20 times, Local 150's business agents had followed him when he was picking up materials for or delivering materials to Geske, at distances of 10 to 25 feet.[32] He further testified that Local 1035 Business Agent Bauman had followed him at a 30-foot distance. According to Tigger, these persons ''followed us to all the jobs I did. A lot when I moved the paver, they always followed me to the next job.'' On September 24, he testified that he had seen other Geske drivers' vehicles being followed from the Geske plant to Geske's jobs by persons whom he believed to be associated with the picketers. He testified, without being asked for dates, to one occasion when he saw a Lake Zurich vehicle being followed down the conservation district road as far as Route 14; to another occasion when he saw a Parking Lot Services vehicle being followed part way down Route 14, after which he saw the following car at a parking lot job farther down Route 14; and to one occasion when a Tim's Excavating vehicle was followed on Route 14 to the intersection of Route 176, where the Tim's Excavating vehicle turned one way and the alleged followers turned another way. Also, he testified on September 24 that since August 19, when he came into the Geske plant, pickets and/or persons associated with them made obscene gestures and ''stared [him] down.'' On September 25, 1991, Geske truckdriver Hansen testified before the state court that he had reported to work every day during the time that the Local 150 placards were there; that during this period he had seen Local 150 Business Representative Chuck August at the Geske plant just about every day and Local 301 Business Representative Layoff around the Geske plant about 20 times and parked at the Township job on one occasion; and that during this period he had seen Local 1035 Business Representative Bauman ''just about every day'' parked at the Dorr County jobsite during a 2-week period when Hansen was driving to that job on a daily basis.

On September 24, 1991, Geske driver Coss testified at the state court trial that on September 20, 1991, Laborers Local 1035 Business Representative Bauman was parked in his black pickup truck across the street from the Geske plant, and a red Jeep wagon was parked in the same area. Coss went on to testify to the following effect: On that day, he drove a Geske truck from the plant to Rockford, Illinois, a 35-mile distance, to get a load of gravel. Initially, his truck was followed by both vehicles. After the three vehicles had traveled a distance that is not shown by the record, the Geske truck was passed at a stoplight by the red Jeep, which at least after it passed the Geske truck proceeded at a 30- or 35-mile rate in a 45-mile-per-hour zone. Coss tried to pass the red Jeep by signaling an intent to pass and then going into the left lane of the highway, which is two lanes wide, but pulled back into the right lane after the Jeep moved into the left lane and drove at a lower speed than the Geske truck. When the speed limit increased to 50 miles an hour, the red Jeep increased its speed and temporarily vanished from Coss' sight. The black truck continued to follow the Geske truck. Eventually, at a point where the speed limit was still 50 miles an hour and the highway still had two lanes, Coss again saw the red Jeep ahead of him. The Jeep proceeded ahead of him at 35 or 40 miles an hour for 3 or 4 miles. When Coss again tried to pass the red Jeep, it again went into the left lane. Eventually, the red Jeep permitted Coss to pass, and then followed about two car lengths behind Coss at a rate of 45 to 50 miles an hour to Charles Lee's gravel pit. After the red Jeep began to follow Coss, the black

[31] Geske's opening brief states that it was ''reasonable'' for Tigger to ascertain from Powers why Geske's contract with Vulcan would not be honored, because ''Powers was clearly the only Vulcan representative on site at this time'' (at 15–16, fn. 15). As previously noted, Tigger testified at the state court trial that he gave a copy of the September 5 restraining order to ''Al,'' who runs Vulcan's scale house.

[32] Tigger testified that Lester had followed him at a 10-or 15-foot distance while Tigger was going 50 to 55 miles an hour. At the state court trial, Quigley, whom Tigger identified as a follower, denied such activity.

pickup truck went back. The red Jeep drove off while Coss was on the scale.

S. *Geske's Motion for Sanctions and to Amend the Temporary Restraining Order; the Removal Proceedings*

On September 6, 1991, Geske filed with the state trial court a document captioned ''Motion to Amend Temporary Restraining Order and to Seek Sanctions for Failure to Follow Temporary Restraining Order.''[33] This motion averred, inter alia, that ''Notwithstanding the service of the [circuit court's] orders . . . [on occasion] Chuck August and the men [inferentially referring to those with Local 150 hats] sit there without the sign. . . . The activity of defendants is an affront to the Court and makes a mockery of the Court's order.'' The motion sought amendment of the court's order (1) to fine Operating Engineers Local 150, and Teamsters Local 301, $1000 each for every day that they did not honor the court's order; and (2) to forbid ''all representatives of Operating Engineers Local 150 and Teamsters Local 301 from having any persons within 1000 yards of the entrance of the Geske Asphalt plant on 420 Northwest Highway or any other facility of Geske or the locations of any suppliers where Geske is picking up supplies or the interference of any of Geske's customers''; on the ground that ''the presence of these persons in view of their past conduct, continues to intimidate customers and suppliers of Geske.''[34] Attached to this motion was an affidavit by Lori, dated September 6, which did not name Teamsters Local 301. This affidavit stated, inter alia, that after the service of the temporary restraining order, she had observed (1) ''persons'' refusing in August's presence to remove the signs that said ''On Strike''; (2) ''Several clusters of picketers are standing in the roadway diverting the attention of all suppliers and customers by obstructing the normal flow of traffic''; and (3) ''August and two other persons wearing Local 150 hats continue to congregate opposite the plant where three picket signs are displayed which say 'On Strike' [their] presence, even when the picket sign is not showing, continues to intimidate our customers and interfere with our business.'' In addition, Lori's affidavit avers that ''the activities have escalated substantially''; that more cars were ''out there'' than previously; that one car with the license plate ''SCABBY'' had an inflatable rat on its roof and a sign ''Local 150 Rat Patrol'' on its sides; and that suppliers and customers were intimidated by this activity and many were refusing to cross.[35]

Also on September 6, Operating Engineers Local 150 and Teamsters Local 301 filed in the United States District Court for the Northern District of Illinois, Eastern Division, a ''Verified Notice for Removal'' of the state court proceeding to the district court. The ''Notice for Removal'' alleged that the proceeding was removable under 28 U.S.C. § 1441(a) and (b), on the ground that Geske was seeking damages for conduct defined as an unfair labor practice under Section 8(b)(4) of the Act, over which the district court had original jurisdiction under Section 303 of the Act (cited as 29 U.S.C. § 187).

On a date that the parties stipulated was ''shortly thereafter'' but that is not otherwise shown by the record, Geske filed with the Federal district court a motion for remand of the matter to the state court. On September 11, 1991, the Federal district court remanded the case on the ground that Geske's complaint does not on its face contain a Federal claim.[36] The court stated that Locals 150 and 301 ''may be correct that [Geske] will prove a claim that is preempted by [F]ederal law. [Locals 150 and 301] may also be correct that [Geske] may not even state a claim under state law. If so the state court can dismiss the complaint, either because of preemption or for failure to state a claim.'' That same day, Geske filed with the state trial court a copy of the Federal district court's remand.

Meanwhile, on September 10, 1991, with the Regional Director's approval, Geske withdrew its August 23 8(b)(4)(B) and 8(e) charges against Operating Engineers Local 150 (supra, part III,H). As to Geske's August 23 8(b)(4) charge (Case 33–CC–1053) against Local 301 (supra, part III,H), the Regional Director approved on October 24, 1991, a unilateral settlement agreement with a nonadmission clause, in which Local 301 undertook, inter alia, not to engage in, or induce or encourage individuals employed by Smith Cartage Company or any other person to engage in, a strike or a refusal in the course of his employment to handle any materials; and not to threaten Smith Cartage, Geske, or any other person; when, in either case, an object thereof is to force or require Smith Cartage to cease doing business with Geske or Geske to cease doing business with Patching (cf. supra, part III,B). On that same day, the Regional Director dismissed the remaining portions of Geske's charge against Local 301, which charge, inter alia, complained of pressure on Geske as to the picketing of Patching, and on neutrals as to the picketing of Geske, ''with an untruthful sign, the signal effect of which is to falsely cause employees of neutrals to believe that the Union is 'on strike' when, in fact, the Union does not represent any employees of Geske and has never represented any employees of Geske.'' The dismissal letter stated, in part, that the settlement agreement ''affords a full remedy for the conduct otherwise warranting complaint.''

T. *Local 150's September 1991 Charges Against Geske*

Meanwhile, on September 9, 1991, Operating Engineers Local 150 filed with the Board's Regional Office a charge (dated September 4, and docketed as Case 33–CA–9545), which alleged that about August 19 and 21 Geske had violated Section 8(a)(1) of the Act by threatening and interrogating ''bargaining unit employees'' with respect to Local 150. On September 19, Local 150 filed an 8(a)(1) charge (dated September 16, and docketed as Case 33–CA–9557–1) alleging unlawful interrogation of ''bargaining unit employees'' since September 16, 1991, by Lori and by Attorney Smetana. Local 150's withdrawal of these charges was approved by the Regional Director on October 29, 1991. Also on September 19, Local 150 filed the charge which gave rise to the case at bar.

[33] So stipulated by the parties. The document is stamped ''Docketed September 9, 1991.''

[34] Geske's counsel have repeatedly disavowed any effort to obtain an injunction against picketing generally.

[35] On September 13, 1991, she testified at the state court trial that she believed two pickets were ''enough to be intimidating.''

[36] The district court noted, however, that par. 18 of the complaint as originally drafted alleged that Locals 150 and 301 were carrying out a secondary boycott. See supra, fn. 25.

U. *Geske's Filing of its Second Amended Complaint Against Locals 150 and 301; Subsequent Events*

1. The second amended complaint; the motion to dismiss on jurisdictional grounds

About September 12, 1991, Geske filed a second amended complaint against Operating Engineers Local 150 and Teamsters Local 301. Like the September 5, 1991, complaint/amended complaint, the second amended complaint alleged that Locals 150 and 301 had engaged in trade libel against Geske, and had tortiously interfered with Geske's contractual relations and prospective advantage. The second amended complaint included substantially the same factual allegations as did the amended complaint, and contained further allegations which included alleged incidents involving Wicks, Evans and Sons, and Jack Pease Construction. Further, the prayer for injunctive relief in the second amended complaint added, to the prayer for relief set forth in the amended complaint, a request for injunctive relief with respect to the newly added factual allegations. Also, the second amended complaint failed to include the request in the first amended complaint for ''judgment . . . an amount to be proved at trial,'' but added a request for ''financial relief incidental to injunctive relief in amounts to be proved at trial.''

On September 12, 1991, Local 150 filed a motion to dismiss the state court proceeding, pursuant to paragraph 2–615 or (alternatively) 2–619(1) of the Illinois Code of Civil Procedure (S.H.A. 735 ILCS 5/2–615, 619), on the ground that the court did not have jurisdiction of the subject matter of the action in that (1) the conduct complained of was preempted by the Act because protected or prohibited thereby; and (2) the claim for injunctive relief was prohibited by the Illinois Anti-Injunction Act.[37]

2. The trial before State Judge Sullivan

On about the same date that Geske filed its second amended complaint and Local 150 filed its motion to dismiss, the proceedings in the state court were transferred from Judge Pitluck to Judge Michael J. Sullivan, before whom a trial was held on 9 days between September 12 and 27, 1991. At the outset of the trial before Judge Sullivan, Attorney Smetana requested ''sanctions'' of $1000 a day for every day Locals 150 and 301 at least allegedly violated Judge Pitluck's restraining order—''$1000 a day and them to be 1000 yards away'' (cf. supra, fn. 34 and attached text). Judge Sullivan stated that he would not amend Judge Pitluck's order, that Judge Sullivan would not impose the requested sanctions unless he were to find the sanctioned party to be in contempt of Judge Pitluck's order, and that Judge Sullivan would not simultaneously conduct a contempt proceeding and a proceeding on Geske's petition for a preliminary injunction. At this point, Smetana elected to proceed on Geske's petition for a preliminary injunction. The court deferred ruling on the motion for sanctions until the conclusion of the hearing on the petition for injunctive relief.

[37] Par. 615, whose subject is motions with respect to pleadings, permits dismissal of the entire proceeding under certain circumstances. Par. 619(1) permits a motion for dismissal on the ground that ''the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.''

3. Activities by Laborers Unions at Geske's facility between July and October 1991

About July 1991, at the request of his ''boss,'' Monroe Smith Jr., Laborers Local 1035 Officer Bauman began to ''monitor'' some sites where Geske was paving or getting ready to pave. About late August or early September, Smith told Bauman to ''monitor'' at the Geske property. Smith testified at the state court trial on September 23, 1991, that he visited the picket line at Geske on August 20, where he stayed about 5 or 10 minutes; and that he also went there on August 21. Bauman testified before me that between August 19 and September 17, 1991, while Local 150 was admittedly picketing Geske, he was present at Geske's facility on three to five occasions, and two to four times talked to someone on the jobsite at the asphalt plant, including (perhaps) one business agent. Bauman testified that he did not think Local 150 Business Representative August was there when Bauman was there after September 19. Geske truckdriver Coss testified at the state court trial on September 24, 1991, that almost every day since August 19, he had seen Bauman right across from the entrance to the Geske plant, frequently with Local 150 Business Representative Chuck August and Local 301 Business Representative Layoff. Although Coss was not asked about this matter when he testified before me, on the basis of his and Bauman's demeanor I am inclined to regard Coss as a generally more reliable witness than Bauman; cf. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). During much of the period in question, however, Coss' opportunity to observe was limited by the fact that he worked at night, when (according to Lori's testimony at the state court trial) the plant was not picketed.

Bauman testified before me that his purpose in monitoring Geske's jobsites was to ascertain whether Geske was keeping track of hours and paying prevailing wages; in the absence of any further explication (such as efforts to ascertain this by inspecting the records relevant to Geske of other contractors on the job), I discredit this testimony as unlikely. I also discredit Bauman's uncorroborated and unlikely testimony that Smith instructed him to monitor Geske's property ''to see if we can get something through prevailing wages.'' I do accept, however, as at least partial explanations for Bauman's presence at Geske's plant while the pickets were using Local 150 signs, that he was there partly to follow Geske's trucks to try to monitor Geske's jobs, and partly to visit a Local 1035 member who was a personal friend and worked across the street.

During this August 17 through September 19 period, representatives of about 6 to 8 of the other 20-odd locals that were members of the Laborers' District Council were present at the Geske plant; of these locals, about 2 to 4 had ''jurisdiction'' in the area. Ernest Kumero[38] (who is the head of the Chicago District Council of Laborers, herein called the District Council) probably had authority to ask these other locals to come out; Smith could also have asked them ''because we all work together, as far as the laborers.''

Laborers' Local 1035 is a member of the District Council, which conducts monthly meetings called by Kumero. At a District Council meeting on a date not shown by the record, but inferentially before September 19, 1991, Smith, who was a Local 1035 delegate to the District Council, brought up the

[38] Also referred to in the record as Cumero and Cumereau.

subject of putting pickets on Geske. Kumero thereupon said that Local 1035 would have the District Council's support.

After September 17, 1991, no picket signs naming Operating Engineers Local 150 were displayed at Geske facilities in 1991.[39] On September 23, 1991, Smith testified at the state court trial to the following effect: On a date that Smith could not recall, but when Local 150 was not picketing, Kumero telephoned him to start picketing Geske. The decision to start picketing on September 19 was made by the District Council. On September 18, after 3:30 p.m., Smith told Bauman to start picketing at Geske on September 19. Since Laborers' Local 1035 started picketing, business representatives from 10 or 12 Laborers' locals (including Locals 681, 152, 225, 25, 288, and 75) had been at the picket line.

Laborers' Local 1035 set up a picket line on September 19, 1991, which was maintained through October 2, 1991. Local 1035's picket signs were about 17 inches by 11 inches, and read, ''Labor Local #1035 Demand Recognition from Geske & Son, Inc. as Laborers Bargaining Unit Representative.'' The president of Laborers Local 681, Randy Dalton, participated in this picketing and probably carried this picket sign. On September 23, 1991, Smith testified at the state court trial that at his and the District Council's direction, the Local 1035 pickets were supposed to keep records of the companies who made or tried to make deliveries. On September 23, 1991, Geske truckdriver McKelvey testified at the state court trial that Laborers Local 1035 Representative Bauman had been at the picket line ''for the last week'' and Local 150 Representative Smith had been there yesterday. McKelvey further testified that on one occasion after the signs were changed and Bauman or Smith was at the picket line, a car driven by someone whom McKelvey did not recognize started to follow him from the Oak Street job back to the Geske plant. Geske driver Coss testified on September 24, 1991, at the state court trial, that on September 20, when he was backed up at Meyer Material's pea gravel pile and the Meyer loader was preparing to load him, ''a guy in a blue pickup with a sign in his hands,'' which was the ''new sign'' and not the Local 150 sign, came up, whereupon the loader pulled away.

4. Geske's September 1991 charges

On September 23 and 26, 1991, during the course of the trial before Judge Sullivan, Geske filed seven 8(b)(7)(C) charges with the Board's Regional Office. The five charges filed on September 23 (Cases 33–CP–268 through 33–CP–272) each consisted of identical allegations naming as respondents, Operating Engineers Local 150, the Construction General Laborers District Council of Chicago, and three affiliates of the District Council—Locals 1035, 75, and 681. These five charges alleged that these five labor organizations had ''acted in concert and continue to picket [Geske] for a reasonable period [sic] in excess of 30 days with an objective to obtain recognition from [Geske] for the employees of Geske without a petition for an election having been filed. Secondly said picketing is interfering with deliveries and said picketing is untrue.'' The September 26 charges (Cases 33–CP–273 and 33–CP–274) were filed against Teamsters Local 301 and Operating Engineers Local 150, respectively. These charges alleged, in part, that since about August 19, 1991, Locals 301 and 150 have ''acted in concert and continue to picket with'' each other; and that they ''have each acted in concert and agents of each other by carrying signs with the inscription 'Local 150 on strike for recognitional and organizational purposes.''' Further, both charges alleged that Locals 150 and 301 were ''each agents of and responsible for the picketing since September 19, 1991 by Laborers Local 1035 and as a continuation of the picketing violative of Section 8(b)(7)(C) conducted by Local 150 and Local 301 [whose] picketing and actions [have] interfered with neutral employers and deliveries to and from customers and suppliers at [Geske's] asphalt plant.''

5. Geske's third amended complaint; Judge Sullivan's denial of Geske's request for a preliminary injunction

Also, about September 25, 1991, Geske attempted to file a third amended verified complaint, discussed below, which among other things added as defendants 3 unions (the Laborers District Council and its affiliated locals 681 and 1035), 10 union business agents, and employers Vulcan (supra, part III,D,E,J,P) and Melahn (supra, part III,D,U,3). Judge Sullivan did not allow the filing of this document at that time.

Before receiving any evidence, Judge Sullivan indicated on September 12 that the temporary restraining order would be continued until the hearing had been concluded. On the third day of the trial (September 16), a day devoted entirely to motions, Judge Sullivan stated that he had heard ''sufficient evidence'' to warrant denying the motion to vacate the temporary restraining order; before hearing any additional evidence, he stated on the fourth day of the trial (September 20), ''The Court believes that there is sufficient matters in the record for this court not to vacate the temporary restraining order.'' On the seventh and eighth days of the trial, he renewed the temporary restraining order the ground that at the beginning of the trial, he had indicated that he would continue the temporary restraining order until the conclusion of the trial.

On September 26, 1991, after 8 days of hearing during which Geske called about 17 witnesses, Geske rested its case in chief on the motion for a preliminary injunction. On September 27, 1991, Judge Sullivan issued a bench decision granting the defendants' motion under Section 2–1110 of the Illinois Code of Civil Procedure for a directed finding, and denying Geske's request for a preliminary injunction.[40] He

[39] This finding is based on Chuck August's testimony before me, which was not contradicted at the hearing before me. A charge filed by Geske on June 12, 1992, and docketed as Case 33–CP–278, averred, inter alia, that Local 150's picketing ''resumed'' on May 7, 1992. So far as the record evidence shows, between September 17, 1991, and May 7, 1992, Geske was not picketed with any signs stating that Local 150 was on strike against it. Moreover, on December 3, 1992 (the first day of the hearing before me), Geske stipulated, ''On or about May 7, 1992, and continuing until on or about June 19, 1992, Local 150 picketed Geske, with picket signs that stated, 'IUOE on strike against Geske for unfair labor practices.''' A document, however, dated November 23, 1993, and captioned ''Respondent's Reply to the General Counsel's Opposition to the Admission of Certain Exhibits,'' states (at 2), ''Local 150's 'On Strike' picketing continues even to this day.''

[40] This section reads in part as follows:

> Motion in non-jury case to find for defendant at close of plaintiff's evidence. In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judg-

based this decision on the ground that as to the trade libel allegations the likelihood of success was small, and as to the tortious-interference allegations Geske had not established that it had likelihood of success on the merits.[41] Judge Sullivan held that the message on the picket signs did not constitute actionable trade libel under *Vee See Construction Co. v. Jensen and Halstead, Ltd.*, 79 Ill. App. 3d 1084, 34 Ill. Dec. 444, 399 N.E. 2d 278 (Ill. App. Ct., 1st Dist., 4th Div., 1979), cited in Geske's September 5, 1991 motion for a temporary restraining order and for a preliminary and permanent injunction. Judge Sullivan stated that where (as in the case before him) the plaintiff is a corporation, under *Vee See*, supra, the complained-of statement ''must be allegedly defaming the plaintiff in its trade or business, must assail the corporation's financial position or business methods or accuse it of fraud or mismanagement,'' and that no reasonable extension of the message on the signs ''could be thought to assail the corporation's financial position or business methods or accuse it of fraud or mismanagement.'' As to *Lowe Excavating Co. v. International Union of Operating Engineers, Local No. 150*, 180 Ill. App. 3d 39, 129 Ill. Dec. 300, 535 N.E. 2nd 1065, 131 LRRM 2786 (Ill. App. Ct., 2nd Dist., 1989), appeal denied 126 Ill. 560, 541 N.E. 2d 1107 (1989), cert. denied 110 S.Ct. 499 (1989), heavily relied on by Geske, Judge Sullivan stated that it addressed whether that lawsuit (a defamation action brought under Illinois law) was preempted by the Act, and not whether the complained-of statements constituted trade libel against a corporation under Illinois law. As to the allegations of tortious interference with contractual relations and prospective advantage, Judge Sullivan found that there had been a certain level of interference with Geske's business, but that ''by the very nature of having the picketers . . . does have an interfering—you know, that's intended . . . . that in a part of it.'' He further stated that there was no evidence of violence or threats of violence and little or no evidence of unlawful trespass, no significant wrong appeared to have been committed in connection with following cars, and the evidence as to any illegal interference in connection with stopping traffic on the county conservation road was not particularly strong.

In light of the court's denial of injunctive relief, Geske did not pursue its September 6 request for sanctions against Local 150 for alleged violation of the temporary restraining order. Judge Sullivan's order denying Geske's request for a preliminary injunction included an order granting Geske's September 25 request for leave to file a third amended complaint. Such an amended complaint was in fact filed by Geske that same day. This third amended complaint added various new defendants and allegations. Newly named as defendants were two employers (Vulcan and Melahn); three labor organizations (Construction General Laborers' District Council of Chicago; Laborers' International Union of North America, Local 681; and Laborers' International Union of North America, Local 1035); and 12 individuals who were business agents and/or officers of certain labor organizations.[42] Of these 12, 6 were business representatives and/or officers of Operating Engineers Local 150 (Chuck August, Robert Paddock, Gary Laney, Michael Quigley, Kal Lester, and Angel Delrivero); 2 were business representatives and/or officers of Teamsters Local 301 (Bud Layoff and Mike Haffner); 2 were business representatives and/or officers of Laborers Local 681 (Randy Dalton and Tom Penny); and 2 were business representatives and/or officers of Laborers Local 1035 (Monroe Smith Jr., and Gerald Bauman).[43] As to the two original defendants in this state proceeding (Operating Engineers Local 150 and Teamsters Local 301), the third amended complaint included virtually all the allegations in the second amended complaint. As to all the defendant labor organizations and individuals, the third amended complaint requested not only injunctive relief, but also financial relief ''incidental to injunctive relief,'' together with costs, attorneys' fees, and ''such other relief as this Court deems just and proper.''

6. The dismissal of Geske's September 1991 8(b)(7)(C) charges

Among the evidence submitted to the Regional Director in the investigation of Cases 33–CP–268 through 33–CP–274 were the transcripts of the proceeding before the state court. On October 7, 1991, with the Regional Director's approval, Geske withdrew the charges in Cases 33–CP–269 through 33–CP–272 (that is, the 8(b)(7)(C) charges against the Laborers' District Council and its Locals 1035, 75, and 681). On October 8, 1991, the Regional Director dismissed the charges in Cases 33–CP–268, 33–CP–273, and 33–CP–274 (that is, the September 1991 8(b)(7)(C) charges against Operating Engineers Local 150 and Teamsters Local 301). The Regional Director's dismissal letter stated, in part:

> The investigation disclosed that the Employer was initially picketed from August 19, 1991 (all dates 1991) until September 18. The picket signs read: ''I.U.O.E. Local 150 on strike against Geske for representation as majority bargaining representative of company's operating engineer employees.'' On September 20, Laborers' Local 1035 began picketing the Employer with signs which stated that Geske did not have a contract with Local 1035.
>
> During the time that Local 150 was picketing, business agents of Local 150 and Local 301 carried the Local 150 signs and made appeals to Geske's employes, suppliers and customers. There was no evidence that Local 150 or its agents engaged in any such conduct after September 18. Further, the fact that Local 150's picket sign read ''on strike . . .'' does not make the picketing proscribed under the proviso to 8(b)(7)(C), as you contend, because it is untrue. While Geske employees are not ''striking'' and, therefore, the picket sign can be deemed to be directed at employees rather than the public (*United Brotherhood of Car-*

ment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered . . . .

[41] In the alternative, he relied on the state anti-injunction statute.

[42] I do not understand the statement in Geske's opening brief to me (at 41) that ''none of the persons engaging in the picketing and allegedly libelous statements are involuntarily made defendants . . . the union's business agents who engaged in driving Geske's customers away are first named as agents of Local 150.''

[43] The complaint misspelled his name as Bowman.

penters and Joiners of America, Local No. 1849, 208 NLRB 461 (1974) which you cited supports that conclusion) your argument is otherwise misplaced. The publicity proviso is intended to allow a defense to an 8(b)(7)(C) charge by a labor organization which chooses to advise the public truthfully that the employer does not employ members of or have a contract with that labor organization. Local 150 is not claiming such a defense nor denying its recognitional object. Moreover, as stated above, Local 150 has not picketed in excess of 30 days. In this regard, there is no probative evidence to establish that the picketing by Local 1035 which commenced on September 20 had, as an object, the recognition of Local 150 by Geske. Local 1035's picket sign clearly stated Geske has no contract covering its laborer employees. Although there is some evidence that the separate periods of picketing by Local 150 and Local 1035 may have been coordinated, the evidence is insufficient to establish that the picketing constituted joint and concerted activity to warrant the conclusion of a joint venture. See *Laborers Union Local 383 (Colson and Stevens)*, 137 NLRB 1650 affd. 323 F.2d 422 (C.A. 9) 1963; *International Union of Operating Engineers, Local, AFL–CIO et al. (Seaward Construction Company, Inc.*), 193 NLRB 632 (1971). In these circumstances it cannot be proven that the two unions were doing anything other than cooperating as was done by the unions in [*United Brotherhood of Carpenters and Joiners, Local Union No. 2064 (Westra Construction, Inc.*), 175 NLRB 881, 883 (1969)]. Cooperation between unions to achieve separate objectives does not eliminate each union's statutory right to picket up to 30 days for recognition without a representation petition being filed. Accordingly, there is insufficient evidence to prove Local 150 violated Section 8(b)(7)(C) of the Act as alleged.

With respect to the charge against Local 301, the fact that a Local 301 business agent may have assisted Local 150 and Local 1035 in their respective picketing and other conduct does not establish that Local 301 ever picketed Geske with a sign that bore its identity or made any recognitional demand in its own name. Nor is there evidence that Local 301 otherwise made a demand upon Geske for recognition on its behalf. In these circumstances, at most Local 301's conduct could only be found to be on behalf of Local 150 or Local 1035 (i.e., that the Local 301 business agent was an agent of Local 150 or Local 1035, respectively, during their separate periods of picketing). Inasmuch as I have previously concluded that Local 150 did not picket in excess of 30 days, even assuming Local 301 acted as Local 150's agent during its picketing, this conduct does not establish a violation of Section 8(b)(7)(C) of the Act as alleged.

On February 25, 1992, the NLRB Office of Appeals denied Geske's appeal ''substantially for the reasons set forth in the Regional Director's [dismissal] letter.''

7. The voluntary dismissal of Geske's third amended complaint as to certain defendants

Meanwhile, about October 14, 1991, Geske filed with the state circuit court a motion to dismiss voluntarily its complaint against Laborers District Council and its locals 681 and 1035, the individuals who were officers and/or business agents of these labor organizations (Randy Dalton, Tom Penny, Monroe Smith, and Gerald Bauman); Vulcan; and Melahn. By order dated October 17, 1991, this motion was granted without prejudice.[44] Geske's reply brief states that the complaint against Melahn ''was voluntarily dismissed after he indicated that he had never given permission to the Unions to be on his property and that would continue to be his policy in the future. Vulcan was similarly dismissed from the suit after they again continued to contract with Geske'' (at 24–25; see also 4–5 of Geske's reply Br. and 14 fn. 14 of Geske's opening Br.). Further, Geske's reply brief states (at 24) that the remaining voluntary withdrawals were made ''pursuant to a Settlement Agreement between Geske and the Laborers in which they agreed to cease all such conduct in the future and similarly agreed to withdraw their unfair labor practice charges against Geske;'' see also, page 9 fn. 7, page 11 fn. 9 of Geske's opening brief and Geske counsel Smetana's letter to me dated November 8, 1993. Counsel have not favored me with any citations to the record in connection with these assertions as to the events which preceded Geske's withdrawal requests or Geske's motive for seeking withdrawal, and I can find nothing in the record to support such assertions.

8. Local 150's motion to dismiss Geske's third amended complaint and its counterclaim against Geske for malicious prosecution

On October 15, 1991, Operating Engineers Local 150 filed a motion to dismiss the still-pending portion of Geske's third amended complaint, and a counterclaim against Geske for malicious prosecution. On December 5, 1991, Geske filed a motion to dismiss Local 150's counterclaim. Each party filed briefs on these motions. As of December 7, 1993, these motions were still pending (see infra, part III,U,11).

9. Local 150's withdrawal of certain 8(a)(1) charges; Geske's interlocutory appeal of Judge Sullivan's September 1991 order; Judge Sullivan's stay of Geske's state court lawsuit

About October 18, 1991, Geske filed an interlocutory appeal from the state trial court's denial of injunctive relief. On October 29, 1991, the Regional Director approved Operating Engineers Local 150's withdrawal of the charges in Cases 33–CA–9545 and 33–CA–9557–1—that is, the charges alleg-

[44] The order also dismissed counts 4 and 5 against all defendants. Count 4 was based on Vulcan's alleged refusal to load Geske because of alleged conduct by the other defendants (except Melahn). Count 5 (misnumbered 4 in the third amended complaint) was based on Melahn's conduct in allowing the other defendants (except Vulcan) to remain on the exterior of Melahn's property, even after being notified by Geske that these defendants' presence and actions ''constituted trade libel and tortious interference with [Geske's] contractual relations and prospective advantage.'' Cf. supra, fn. 11.

ing unlawful threats of discharge and shutdown, and unlawful interrogation, in connection with Local 150 activity (supra, part III,T).

On November 13, 1991, Local 150 served on Geske, in connection with the state proceeding, Local 150's first set of interrogatories and its first request for presentation of documents. On March 16, 1992,[45] Geske filed with the state trial court a motion to stay further proceedings in the trial court pending the decision of the Second District Appellate Court concerning Geske's interlocutory appeal. The motion alleged in part, ''the Second District Appellate Court's decision on the issues appealed from will determine, to a large degree, the course of further litigation in the trial court . . . all parties to this action will continue to [litigate] matters that will ultimately be determined by the decision of the Appellate Court. The continued litigation concerning issues that may be rendered moot by the Appellate Court would be fruitless.'' On March 16, 1992, Judge Sullivan, over Local 150's objection, issued an order drafted by Geske's counsel ''that all proceedings in this matter are hereby stayed pending the decision (or any appeal therefrom) of the 2d District Appellate Court.''

10. The processing of the instant charge against Geske; the Regional Director's ''*Loehmann*'' letter

Meanwhile, on an undisclosed date, the Regional Director referred the September 1991 charge in Case 33–CA–9557–2 (the charge that gave rise to the case before me), including the request set forth therein for relief under Section 10(j) of the Act, to the General Counsel's Division of Advice. On March 24, 1992, Local 150 filed its first amended charge in Case 33–CA–9557–2, renewing its request for 10(j) relief.

As previously noted, on March 30, 1992, the Regional Director issued the original complaint in the case at bar; this complaint alleged that Geske had violated Section 8(a)(1) by filing, maintaining, and prosecuting in state court a lawsuit including certain causes of action that are without reasonable basis and were motivated by an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize Geske's employees by engaging in lawful recognitional picketing. On April 1, 1992, the Regional Director sent virtually identical letters to the respective clerks of the state trial court and the state appellate court, with courtesy copies to Geske, Lori Geske, and Geske counsel, among others. After setting forth the title and docket number of Geske's state court lawsuit, these letters read as follows:

> I am writing to you as Regional Director of Region 33 of the National Labor Relations Board (Board). On March 30, 1992, I issued an unfair labor practice complaint in Case 33–CA–9557–2, alleging that Geske and Sons, Inc., is violating Section 8(a)(1) of the National Labor Relations Act by unlawfully interfering with the protected concerted activity of Operating Engineers Local 150 in seeking to organize the employer's operating engineer employees by engaging in lawful recognitional picketing.
>
> As a result of the issuance of the complaint, state court jurisdiction is preempted until such time as the Board holds that the state court suit has a reasonable basis and was not filed in retaliation for the Union's protected conduct. See *Loehmann's Plaza*, 305 NLRB [663, 669–672, 675 (1991)].[46] Accordingly, the state court action should be held in abeyance pending the Board's decision.
>
> A copy of this letter is being sent to Geske and Sons, Inc. This party may not actively pursue the state court lawsuit and has seven (7) days to seek a stay of the state court proceeding. If there is an outstanding injunction, this party has seven (7) days to seek to have it withdrawn. If Geske and Sons, Inc. fails to heed these instructions, it may be subject to additional liability under Section 8(a)(1) of the Act.

11. The actions of the state appellate and supreme courts, and of the Supreme Court of the United States; Geske's 1992 8(b)(7) charges

On April 7, 1992, the state appellate court, on its own motion, ordered the parties in the state court proceeding pending before it to file a response to the Regional Director's April 1 letter within 10 days and incorporate any appropriate motion to stay the appeal. On April 17, 1992, Operating Engineers Local 150 filed a motion to summarily dismiss Geske's appeal or, in the alternative, to stay the state court proceedings until conclusion of the litigation before the Board. A document filed by Geske with the state appellate court on April 23, 1992, states that ''on April 7, 1992, per telephone conference with counsel for [Geske], the Board agreed to extend the time in which [Geske] had to respond to [the Regional Director's] letters to April 14, 1992.'' On April 8, 1992, Geske's counsel filed with the appellate court a motion for an extension of time within which to file Geske's reply brief. By order dated April 14, 1992, the appellate court extended the due date for Geske's reply brief to May 4, 1992. On April 23, 1992, Geske's counsel filed with the appellate court a motion for various extensions of time to file (1) its response to the Regional Director's April 1 letter; (2) its response to Operating Engineers Local 150's motion to dismiss or, alternatively, to stay Geske's appeal; and (3) Geske's reply brief. This motion was granted by the appellate court, with the effect, inter alia, of extending to April 30, 1992, the due date of Geske's response to the Regional Director's April 1 letter and to Local 150's motion to dismiss or alternatively to stay the appeal.[47] On that date, Geske filed with the appellate court an opposition to that motion by Local 150. Also on April 30, 1992, the Regional Director amended the original complaint in the case at bar by adding the allegation that Geske violated Section 8(a)(1) by filing, maintaining, and prosecuting the state court lawsuit with certain causes of action that are preempted by the Act. On May 19, 1992, the appellate court entered an order denying Local 150's motion to dismiss the appeal; however, as to Local 150's motion to stay the appeal, the court stated:

[45] All dates hereinafter are 1992, unless otherwise stated.

[46] I discuss infra (part III,V,1), Geske's contention that *Loehmann's Plaza*, supra, is no longer viable in connection with the instant case.

[47] Attached to this opposition is an inaccurate copy of an Advice memorandum discussed infra, fn. 64 and attached text.

> The appeal is stayed pending determination by the National Labor Relations Board whether the pending lawsuit has any reasonable basis. [Geske] is ordered to inform this Court within 90 days as to the status of the determination by the National Labor Relations Board.

A document filed with the state appellate court by Geske's counsel dated May 27, 1992, and captioned ''Motion of Plaintiff-Appellant [Geske] for Reconsideration of Court's Order Staying Appeal on May 19, 1992,'' avers that counsel did not receive that order until May 27. The appellate court's April 29 order had extended the May 4 due date for Geske's reply brief to 14 days after the appellate court's decision on the motion to stay. Geske filed a reply brief in the appellate court dated May 28, 1992.

Meanwhile, about May 7, 1992, and continuing until on or about June 19, 1992, Local 150 picketed Geske with picket signs which stated, ''IUOE ON STRIKE AGAINST GESKE FOR UNFAIR LABOR PRACTICES'' (see supra, fn. 39). On May 29, 1992, Geske filed with the appellate court a ''Motion for Reconsideration of Court's Order Staying Appeal on May 19, 1992''; and, on the basis of this picketing, an ''Emergency Motion for an Expedited Hearing in View of Continuing Picketing in Reckless Disregard for the Truth.'' Geske's motion for reconsideration alleged, in part:

> The issue on appeal is strictly a state law question of what constitutes trade libel under the laws of Illinois, which we contend was unreasonably applied by Judge Sullivan.[48]

Geske's ''Emergency Motion'' alleged, in part:

> [I]t would be futile to go back to [trial] Judge Sullivan in light of his erroneous view that there is no trade libel in this case because ''on strike'' is accepted parlance absent evidence of violence or threats thereof. . . . Going before Judge Sullivan with this motion would be futile because his erroneous prerequisites of violence or threats of violence are not present here.

On a date not shown by the record, Local 150 filed an opposition to the May 29 motions. On June 4, 1992, Geske filed a response to this opposition. This response stated, in part:

> [Geske's principal] assertion . . . is the futility of making an application to the circuit [trial] court . . . the underpinning of Judge Sullivan's decision on preliminary injunction, which is the subject of the appeal to this Court, would make it futile to ask Judge Sullivan to grant the very relief he has already denied.

On June 24, 1992, the appellate court denied Geske's May 29 motions.

In June 1992, the General Counsel rejected Local 150's request for 10(j) relief against Geske.

On June 29, 1992, on the basis of the May 1992 picketing previously mentioned, Geske filed against Local 150 two charges which, taken together, alleged that Local 150 had violated Section 8(b)(4)(i), (ii)(A), and (B) of the Act by trying to cause Edscott Toyota and Duggan Trucking to cease doing business, and to agree to cease doing business, with Geske. Geske withdrew these charges on July 9, 1992. On July 7, 1992, Geske filed two substantially similar charges against Local 150; Geske withdrew these charges on July 23.

On June 12, 1992, Geske filed a charge against Local 150 (Case 33–CP–278) alleging that it had violated Section 8(b)(7)(C) of the Act. The charge alleged, in part:

> Since on or about August 19, 1991 [Local 150] has picketed for a period in excess of 30 days where an object is to obtain recognition from Geske.
>
> Said picketing resumed on May 7, 1992 with the reopening of [Geske's] construction season . . . with ''ON STRIKE'' signs where an object of the picketing continues to be recognitional.

About July 13, 1992, the Regional Director dismissed the June 1992 8(b)(7)(C) charge in light of the undertakings in a unilateral settlement, approved by him, which contained a nonadmission clause and read in part as follows:

> [Local 150] will cease picketing Geske . . . entirely for a reasonable period of time and, if it ever resumes picketing Geske . . . said picketing shall not be for an unlawful object or conducted in an unlawful manner.
>
> This Agreement resolves only those allegations raised in Case 33–CP–278 and no other allegation, and is not intended to settle, resolve, dispose of or preclude litigation on any other matter, regardless of whether such other matter is now known or unknown to the General Counsel or whether such other matter is or is not now pending before the Board.

The Regional Director's dismissal letter stated, in part, that it would not effectuate the purposes of the Act to institute further proceedings ''since the [Settlement] Agreement affords a full remedy for the conduct otherwise warranting complaint.'' Geske's appeal from the dismissal of the charge was denied by the Office of Appeals.[49] On October 27, 1992, Local 150 signed a ''Notice to Employees'' for purposes of posting pursuant to this settlement agreement.

About August 18, 1992, the state appellate court issued a schedule for oral argument, showing that Geske's appeal was set for argument on September 22, 1992. Geske filed a status report with the appellate court on August 20, 1992. By letter dated August 21, 1992, Local 150's counsel stated that Geske's status report was accurate, but asked whether the oral argument schedule had been issued in error. By letter dated August 25, 1992, Geske urged that the court proceed to the scheduled oral argument, noting, inter alia, that the

[48] Rather similarly, Geske's April 9, 1993, appeal to the Supreme Court of Illinois, which appeal is attached to Geske's April 14, 1993, opening brief to me, states, ''The claims of tortious interference stand or fall with the claim of trade libel.'' Further, Geske's April 1993 opening brief to me states (at 23), ''What statements are libelous is the key question here.'' Geske's June 1993 reply brief to me states (at 2), however, ''This is not a case where the only question for the state court to resolve is whether Local 150 was actually 'On Strike' Rather, the state court must view not only the union's [sic] statements, but also its [sic] collective conduct to determine whether the tortious counts are valid.''

[49] I see nothing in the record to support Geske's assertion (reply Br. 21 fn. 14) that contemporaneously with the 1992 picketing, Local 150 said that it wanted Geske to sign a contract.

General Counsel had not sought relief under Section 10(j). By order issued September 14, 1992, the appellate court vacated the stay entered on May 19, 1992, and affirmed the oral argument schedule. By letter to the clerk of the appellate court dated September 15, 1992, after the issuance of the order vacating the stay but (inferentially) before receiving a copy, the Regional Attorney for Region 33 requested that the state court proceedings be stayed pending the Board's decision in the case at bar. This letter stated, inter alia, that Local 150's request for 10(j) relief in the case at bar had been denied because of the stay of court proceedings. In October 1992, the Regional Office again denied Local 150's request for 10(j) relief.

Meanwhile, by order dated September 29, 1992, the state appellate court unanimously affirmed the trial court.[50] On December 1, 1992, Geske filed a petition for rehearing with the state appellate court. The petition alleged, in part, that ''in the labor arena,'' the ''libel per se'' standards which were set forth in *Vee See*, supra, 399 N.E. 2d at 281, and which up to that point had caused judicial rejection of Geske's libel claim, had been preempted by *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), and by *Letter Carriers, Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974); cf. infra fn. 52.[51] This petition was denied on January 5, 1993 (at 2 of attachment E to Geske's opening brief to me). On April 9, 1993 (id.), Geske petitioned the Illinois supreme court for appeal as a matter of right or leave to appeal. The Illinois supreme court denied this petition on June 3, 1993. On June 17, 1993, Geske filed with the Illinois supreme court a motion to stay the mandate for 60 days, on the ground that Geske had determined to file a petition for certiorari with the Supreme Court of the United States. Geske's motion (signed by attorney Smetana) stated, in part, that the state appellate court

> failed to follow the mandate of the U.S. Supreme Court as set forth in *Linn v. Plant Guards*, [383 U.S. 53] (1966) adopting the standards set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) creating partial preemption of state libel laws to the extent that the court mandated that in a situation involving a ''labor dispute,'' the only standard that can be followed by the state in determining the extent of trade libel by a union is that the defamatory statement is actionable only where it is published ''with knowledge of their falsity or in reckless regard for the truth.''
>
> . . . .
>
> In its Petition, Geske will also urge, as we urged before this Court, that further support for the mandatory reading of its standard in defamation cases is found in the U.S. Supreme Court's Decision in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974). In that case, the U.S. Supreme Court . . . reversed the Virginia Supreme Court for its failure to follow the *Linn v. Plant Guard* and *New York Times* standard holding that there is a partial preemption mandating this standard to be applied.[52]
>
> . . . .
>
> The stay is further sought as the respondent union has filed a Motion to Dismiss the underlying case which will be heard by Judge Sullivan in the Circuit Court

[50] The order is stamped, ''This order is not precedential and is not to be cited.'' A motion to me by Geske dated July 13, 1993, with a long caption that begins ''Motion of [Geske] to supplement record with Supreme Court of Illinois Order Staying Mandate,'' attaches a December 16, 1992 order by the Illinois appellate court, which denies a motion by Local 150 ''pursuant to Supreme Court Rule 23, to change the decision from an unpublished order to a published opinion.'' I discuss infra (part III,V,2) the effect on the instant proceeding of this stamp and December 1992 order.

[51] Geske's petition for rehearing also relied on a claim that after Vee See, the Illinois legislature had overruled Illinois common law by permitting lawsuits against a ''voluntary unincorporated association'' (defined as ''any organization of 2 or more individuals formed for a common purpose'') in it own name. S.H.A. 735 ILCS 5/2-209.1. Prior to the enactment of this statute, suits against unincorporated labor organizations were entertained for equitable relief, although not for money damages. See *American Federation of Technical Engineers, Local 144 v. La Jeunesse*, 63 Ill. 2nd 263, 347 N.E. 2d 712, 715 (S.Ct. Ill. 1976). Geske's opening brief to me states that the case against Local 150 was filed in equity (at 22 fn. 23).

[52] Rather similarly, Geske's June 1993 reply brief to me (at 10 fn. 8) states that *Linn*, supra, ''dictates to state tribunals the manner in which trade libel is to be interpreted.'' Then, after quoting the statement in *Austin*, supra 418 U.S. at 281 [quotation marks omitted, emphasis added by me], ''recovery can be *permitted* only if the defamatory publication was made with knowledge that it was false or with reckless disregard of whether it was false or not,'' Geske states, ''In refusing to adopt this standard, the Illinois Appellate Court . . . failed to properly follow the Supreme Court's mandate.'' In addition, Geske's reply brief to me states (at 13 fn. 12, emphasis added), ''The fact that Judge Sullivan . . . believed on the evidence before him that preliminary injunctive relief was not appropriate because Geske had not met a legal standard on the merits of trade libel that was *more stringent* than the *Linn*, *New York Times* standards was simply wrong.'' Furthermore, Geske's November 1993 reply brief to the Supreme Court of the United States in support of Geske's petition for certiorari, which reply brief Geske forwarded to me, stated (at 7–8) that *Austin* requires ''a single national libel standard articulated in *Linn*;'' and further asserts that NLRB Chairman James M. Stephens, in his concurring opinion in *Bill Johnson's Restaurants*, 290 NLRB 29 (1988), ''recognizes the mandate for a single federal standard after *Austin*.'' In attempted support of this assertion, Geske quotes the following portions of the Chairman's concurrence (290 NLRB at 33–34) [emphasis added]: ''[T]he [Supreme] Court set out [in *Linn*] a Federal standard for determining whether a particular libel *could be found* to be actionable . . . a state court that substitutes state common law principles for that standard and *permits* a state law remedy for speech that would be protected under Federal law is properly reversed.'' On December 3, 1992, however the first day of the hearing before me, the following colloquy occurred:

> JUDGE SHERMAN: Well, as I understand it, what the Supreme Court said [in *Linn*] was that . . . at least in cases involving labor disputes . . . the States could create and enforce a cause of action based upon [libel] if the *New York Times v. Sullivan* standard was used. But that it would not require the States to [permit a libel] action even in these circumstances . . . .
>
> MR. AVAKIAN [Respondent's counsel]: I think that is clear and I don't disagree with your recollection.

Moreover, Geske's opening brief (at 25) (although stating that *Linn* ''completely occupies the field of labor libel'') quotes the statement in *Linn* (383 U.S. at 65) that to construe the NLRA so as to ''*permit* recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act'' (emphasis added). See also supra fn. 36 and attached text.

> upon issuance of the Mandate, and in view of the final Order of the Second District affirming an erroneous standard of trade libel when the Petition for Injunctive Relief was filed before the Circuit Court under the *Linn v. Plant Guard* [383 U.S. 53] *Lowe Excavating* [180 Ill. App. 3d 39, 123 Ill. Dec. 300, 535 N.E. 2nd 1065] standard, there is little likelihood that the Circuit Court will act other than to dismiss. There is further almost no likelihood that the Second District would reverse such a dismissal.

Geske's motion to the Illinois supreme court for stay of mandate was received in evidence before me pursuant to a motion by Local 150 dated June 29, 1993, to supplement the record. Local 150's motion put special emphasis on the last two quoted paragraphs of Geske's motion. Geske's July 13, 1993, opposition to this motion was signed by Attorney Smetana, and stated, in part, ''It is wholly inappropriate for Your Honor to consider [Local 150's] suggestion . . . that the undersigned's reference in its Motion to Stay Mandate . . . in which . . . Local 150 called the ALJ's attention to [Geske] counsel's private conjecture concerning what Judge Sullivan, the trial judge, might do on the merits of the trade libel cases, is in any way probative before Your Honor.'' In receiving this June 17 motion into evidence on August 9, 1993, I observed that these paragraphs are ''arguably entitled to probative weight in determining whether Geske acted in good faith in maintaining and prosecuting the lawsuit.'' By letter to me dated August 19, 1993, Geske attorney Avakian stated, in part, ''Geske has been informed by the Circuit Court that the underlying state court case has been transferred from Judge Sullivan to Judge Franz. This transfer to a new state court judge to hear the merits of the case significantly modifies Geske's speculation as to how the assigned judge might view the issues.''

In that same letter, Avakian stated that on August 10, 1993, Justice John Paul Stevens issued an Order allowing the filing of Geske's petition for writ of certiorari to and including October 1, 1993. Such a petition was filed on that date (No. 93-528, *Geske & Sons Inc. v. Operating Engineers Local 150*, 62 U.S. Law Week 3289) and denied on November 29, 1993 (114 S.Ct. 551). Under a covering letter dated December 9, 1993, advising me of the Supreme court's action, Avakian enclosed a copy of an order issued on December 7, 1993, by Judge Sullivan, the state trial court judge who denied Geske's motion for a preliminary injunction. Among other things, this order granted Geske's motion for leave to further amend the complaint and to supplement its opposition to defendants' motion to dismiss. In addition, Judge Sullivan's order reset the case for a status hearing on March 24, 1994.

IV. ANALYSIS AND CONCLUSIONS

A. *Whether Geske Violated Section 8(a)(1) by Filing, Maintaining, and Prosecuting a State Court Lawsuit with Causes of Action Which Are Preempted by the Act*

As previously noted, the portions of the March 1992 complaint that were added thereto on April 30, 1992, allege that since on or about September 5, 1991, Geske had filed, maintained, and prosecuted its state court lawsuit, with causes of action for trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage, that are preempted by the Act, thereby violating Section 8(a)(1) of the Act. As to this branch of the case, the General Counsel heavily relies on *Loehmann's Plaza*, supra, 305 NLRB at 663.

In *Loehmann's Plaza*, supra, the Board began by finding that a retail store and its landlord violated Section 8(a)(1) of the Act by demanding that union representatives, who were not employed by the retail store, stop engaging in peaceful area standards picketing and handbilling protected by the Act in certain areas that were owned by the landlord and leased by it to the store. In so finding, the Board relied on *Jean Country*, 291 NLRB 11 (1988).

Then, the Board went on to consider whether the landlord and the retail store had further violated Section 8(a)(1) by pursuing in state court a lawsuit that sought injunctive relief as to the number and location of pickets and handbillers. As to the period after the issuance of the *Loehmann's*, supra, complaint alleging that the landlord and the retail store had violated Section 8(a)(1) by directing the union to move its pickets, the Board found that the landlord and the retail store had further violated Section 8(a)(1) by continuing to pursue the lawsuit. The Board found that because the picketing and handbilling were ''protected by Section 7'' (305 NLRB at 671; see infra), the lawsuit (1) had a tendency to interfere with (indeed, it was designed to stop) the exercise of a Section 7 right, and (2) was preempted by the proceeding before the Board. Accordingly, the Board found that after the General Counsel had issued his complaint, the landlord and the retail store had violated Section 8(a)(1) by actively pursuing the state court lawsuit, even though the record failed to show that they proceeded with a retaliatory motive. The Board stated (305 NLRB at 670–671, footnotes omitted):

> [O]nce the General Counsel decides to initiate a formal adjudicatory proceeding, the Board's jurisdiction is invoked and it becomes the exclusive forum for an adjudication of a respondent's property rights. Because at that point the state court tribunal ''has no power to adjudicate the [preempted] subject matter,'' any attempt to continue the litigation necessarily amounts to pure harassment, i.e., an effort to subject the defendant or defendants in the lawsuit to litigation costs and burdens before a tribunal that indisputably lacks jurisdiction over the matter at that time.
>
> As stated above, at the point of preemption . . . the ''normal'' requirements of established law apply. Under settled principles, a violation of Section 8(a)(1) is established if it is shown that the employer conduct has a tendency to interfere with a Section 7 right. Accordingly, if the Board in the unfair labor practice proceeding finds that picketing or handbilling on the property in question is protected by Section 7, and if a preempted state court lawsuit is aimed at enjoining that Section 7 activity, it is clear that the lawsuit tends to interfere [with] (indeed, it is designed to stop) the exercise of a Section 7 right. Accordingly, the lawsuit is unlawful under Section 8(a)(1).
>
> As an employer's unlawful exclusion of employees or union representatives from its property violated Section 8(a)(1) without regard to the employer's motive for excluding them, there is no reason for requiring a

> showing of retaliatory motive when the employer pursues a preempted trespass suit seeking the same end. Accordingly, in cases concerning the lawfulness of preempted state court trespass lawsuits, we shall not require that retaliatory motive be shown as an element of an 8(a)(1) violation.

As to the holding in *Bill Johnson's*, supra, 461 U.S. at 738, 744, that the lawsuit at issue there could not violate Section 8(a)(1) absent a retaliatory motive, the Board pointed (305 NLRB at 669) to footnote 5 of *Bill Johnson's*, supra, 461 U.S. at 738, where the Court said:

> [W]hat is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. [The employer] concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise.

See also *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1426–1427 (3d Cir. 1993).

I do not agree with Geske's contention (opening Br. at 46–47) that *Loehmann's Plaza*, supra, is no longer viable for purposes relevant here. Geske relies on the joint motion of the Board and the *Loehmann's Plaza* employers, dated February 3, 1992, to withdraw without prejudice the employers' petition for review and the Board's cross-petition for enforcement in the Court of Appeals for the Sixth Circuit, on the ground that *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), disapproved the Board's analysis of the issue of nonemployee access to private property, *Loehmann's Plaza*, supra, involved a similar issue, the Board applied a similar analysis, and the Board wished to reconsider *Loehmann's Plaza* in light of *Lechmere*, supra. The joint motion to withdraw *Loehmann's Plaza* from the Sixth Circuit was based on the possibility that *Lechmere* called for reversal of the Board's finding that the picketing and handbilling of the retail store constituted protected activity; nothing in either the joint motion or *Lechmere* suggests that *Lechmere* affected the propriety of the Board's conclusions as to the state court lawsuit if the picketing and handbilling were in fact protected. See *Great Scot, Inc.*, 309 NLRB 548, 549–550 (1992); *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1176–1180 (D.C. Cir. 1993). Nor do I perceive any reasonable basis for Geske's contention (opening Br. at 47–48) that *Loehmann's Plaza* applies only to state court lawsuits regarding trespassing. Indeed, *Loehmann's Plaza* relied partly on *San Diego Building & Construction Trades Council v. Garmon*, 359 U.S. 236 (1959), which found preempted a state court lawsuit directed at peaceful strangers picketing for a union shop agreement, although the picketing was not claimed to be trespassory; see 305 NLRB at 668–669 672 fn. 59.[53] Neither do I find anything in the language or reasoning of *Loehmann's Plaza* or *Davis* to support Geske's contention (reply Br. at 15–16) that *Loehmann's* is limited to cases where the state court plaintiff had committed unfair labor practices independent of its maintenance of the state court proceeding.[54] Further, I find to be lacking in merit Geske's claim, in Geske attorney Avakian's letter to me dated December 16, 1993, that *Davis* supports Geske's contention that its state court lawsuit is not preempted by the NLRA. *Davis*, supra, states (1) that the states must defer to the Board's exclusive competence when an activity ''is arguably subject to Section 7 of the Act;'' and (2) that Federal preemption is triggered, at the very latest, when the General Counsel issues a complaint alleging such Section 7 status. In the instant case, because in March 1992 the General Counsel issued a complaint which alleged that Local 150's picketing was protected by Section 7, *Davis* requires the conclusion that preemption has been triggered with respect to Geske's state court lawsuit based on such picketing. Accordingly, Geske is required by *Davis* and *Loehmann's Plaza* to stay its pursuit of its state court action, claiming that such picketing and related action were defamatory, pending determination in the case at bar of whether the picketing was so protected. An affirmative answer will preclude any state court finding that such picketing constituted actionable defamation under state law; see *Loehmann's Plaza*, supra, 305 NLRB at 669, and cases cited. Geske's contention that it ''has no libel remedy at all before the Board'' can have relevance only if Geske prevails in its contention, as a respondent in the instant unfair labor practice proceeding, that the alleged defamation does not enjoy protection under the NLRA. If Geske does so prevail, Geske will be free to pursue its defamation suit in state court.

Geske filed its state court lawsuit on September 6, 1991, and the General Counsel's initial complaint herein, which established preemption under *Loehmann's Plaza*, did not issue until March 30, 1992. Accordingly, as to the branch (par. 6(f)) of the instant complaint based upon filing, maintaining, and prosecuting a state court lawsuit directed against preempted activity, no violation could have occurred until March 30, 1992. *Loehmann's Plaza*, supra, 305 NLRB at 669–670; see also *Davis Supermarkets*, supra, 2 F.3d at 1178–1180; *Great Scot*, supra, 309 NLRB at 549–550; *Oakwood Hospital*, 305 NLRB 680 (1991), enf. denied on other grounds 983 F.2d 703 (6th Cir. 1993). Therefore, paragraph 6(f) will be dismissed at this point to the extent that this paragraph relies on the filing of the state court lawsuit, and on its maintenance and prosecution before March 30, 1992.

The next question to be considered is whether the subject matter of the state court lawsuit as described in the instant complaint (trade libel, and tortious interference with contrac-

[53] In *Loehmann's Plaza*, supra, 305 NLRB at 664, and *Great Scot*, supra, 309 NLRB 548, the state courts had also limited handbilling and/or picketing on public property. However, any issues thus presented were not addressed by the Board.

[54] For example, if the General Counsel issued against two respondent companies a complaint which solely alleged that they were joint employers which violated the NLRA by discharging an employee because he distributed a pamphlet allegedly protected by Section 7, the respondent companies admitted that he was discharged for that reason but denied joint-employer status and the Section 7 protection of the pamphlet, and the Board sustained the complaint as to one respondent, *Loehmann's Plaza* would appear to preempt a defamation suit by either company against the employee (and/or a union which provided the pamphlet to him) even if the Board dismissed the complaint with respect to one of the two companies on the ground that it was not a joint employer of the dischargee. Cf. *Austin*, supra, 418 U.S. at 286.

tual relations and prospective advantage) included ''protected'' activity within the meaning of *Loehmann's Plaza*. Contrary to Geske, a negative answer is not required by the absence of evidence that such activities were engaged in by statutory employees. *Loehmann's Plaza*, supra, 305 NLRB at 664, 670–671; *Oakwood Hospital*, supra, 305 NLRB 680; *Johnson & Hardin Co.*, 305 NLRB 690 (1991); *Great Scot*, supra, 309 NLRB 548; see also *K Mart Corp.*, 313 NLRB 50 (1993); *Bristol Farms*, 311 NLRB 437 fn. 6 (1993); *Richards United Super*, 308 NLRB 201 (1992); *Diamond Walnut Growers*, 312 NLRB 61, 68–69 (1993); *Dahl Fish Co.*, 279 NLRB 1084, 1110–1112 (1986), enfd. 813 F.2d 1254 (D.C. Cir. 1987); *Giant Food Stores*, 295 NLRB 330 (1989), reconsideration denied 298 NLRB 410 (1990). Rather, *Lechmere* stated that Section 7 applies ''derivatively'' to third parties under certain circumstances, because the employees' right of self-organization depends in some measure on their ability to learn the advantages of self-organization from others; 112 S.Ct. at 845–846. Among the sources of such information to employees may be stranger picketing, which includes an aspect of communication as well as the exercise of other influences.[55] The fact that Section 8(b)(7) (including Section 8(b)(7)(C)) constitutes a legislative adjustment between preventing certain perceived ills and respecting the speech aspects of picketing[56] strongly indicates that organizational and recognitional picketing permitted by these statutory provisions constitutes protected activity as that term is used in *Loehmann's Plaza*. A similar conclusion is at least pointed to, and perhaps required, by *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960); see also *Austin*, supra, 418 U.S. at 279–280 fn. 14; *NVE Constructors, v. NLRB*, 934 F.2d 1084, 1087 (9th Cir. 1991). Accordingly, I conclude that conduct that constitutes peaceful, primary recognitional and/or organizational picketing within the meaning of Section 8(b)(7), but which is not forbidden thereby or by any other provisions of the NLRA, at least ordinarily constitutes protected activity as that term is used in *Loehmann's Plaza*.[57] I would reach this conclusion even if the record supported Geske's contention that at allegedly relevant times Geske employed only one employee who was eligible for membership in Operating Engineers Local 150.[58] See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Plumbers Local 195 (Neches Instruments)*, 221 NLRB 1226 (1975). Moreover, although Local 150's picket signs requested recognition as to Geske's ''operating engineer employees,'' the state court record includes testimony by Mike Geske and Geske witness McKelvey that Bill Rucker (identified as a Local 150 business agent in the state court record and in the testimony taken before me) sought in mid-August 1991 to induce Geske truckdriver McKelvey to join ''the union''; and a representation by Teamsters Local 301 Business Agent Layoff to Geske truckdriver Hansen about August 20, 1991 that ''they were organizing.''[59] In any event, an affidavit sworn to by Lori Geske on September 5, 1991, in connection with the state court proceeding, describes both Schroeders as ''employees'' who were ''loader operators,'' a job classification within Local 150's jurisdiction as shown by the testimony of Powers, a Local 150 member who was a loader operator for Vulcan; Lori did not seek to correct Geske's counsel when, during her direct examination before me on December 4, 1992, he repeatedly referred to the Schroeders as ''employees''; and Geske's reply brief (at 23) refers to the Schroeders as ''employees.''

Furthermore, particularly because Section 8(b)(7) does not distinguish between organizational and recognitional picketing (*Curtis*, supra, 362 U.S. at 291), I would reach the same result even if Operating Engineers Local 150 and Teamsters Local 301 had made no nonpicketing effort to organize Geske's employees. In any event, as noted, the record before the state trial court contains evidence that agents for Locals 150 and 301 used oral persuasion in an effort to induce two Geske truckdrivers to join a union. In addition, Mike Geske testified before the state trial court that in mid or late July 1991, Local 150 Business Representative Delrivero gave his business card to Geske employee Zigfried Teachen. Moreover, the credible evidence adduced before me shows that Lori directed Geske's employees not to talk to Local 150 Business Representative August; and that while Local 150 was admittedly picketing Geske's facility, Lori interrupted a conversation between August and Geske's loader operators (the Schroeders), which she believed to constitute an effort by August to induce the Schroeders to talk to him (supra, part III,F). Furthermore, while Operating Engineers Local 150 was admittedly picketing Geske, August normally came

[55] See *Hughes v. Superior Court of California for Contra Costa County*, 339 U.S. 460, 464–466 (1950); *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284, 288–295 (1957). As described by Geske attorney Smetana in his oral argument to the state trial court in connection with defendants' motion for a directed finding after Geske had rested, ''picketing is speech plus.'' Geske's appeal to the Supreme Court of Illinois (at 32 of attachment E to Geske's opening Br.) states: ''Geske recognizes that peaceful and truthful picketing is an exercise of First and Fourteenth Amendment rights. *Retail Clerks v. J. J. Newberry Co.*, 352 U.S. 987 (1957) [reversing per curiam 298 P.2d 375 (S. Ct. Idaho 1956)]. That alone, however, does not make it immune from regulation.''

[56] See generally *Laborers' Local 1184 (NVE Constructors*), 296 NLRB 1325, 1327 (1989), affd. 934 F.2d 1084 (9th Cir. 1991); *NLRB v. Suffolk County District Council of Carpenters (Island Coal)*, 387 F.2d 170, 173–174 (2d Cir. 1967); *Laborers Local 840 (Blinne Construction)*, 135 NLRB 1153, 1156–1159 (1962); *Dayton Typographical Union 57 v. NLRB (Greenfield Printing)*, 326 F.2d 634 (D.C. Cir. 1963); 2 Leg. Hist. 1191(3), 1687(3)–1688(2), 1720(1), 1736(2), 1771(1), 1776(1–2), 1832(1)–1833(2) (LMRDA 1959). (Numbers in parentheses refer to columns.)

[57] A similar conclusion was reached by the state appellate court, in reliance on *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 194 fn. 24 (1978). The Court relied on this conclusion in support of the Court's decision that the defendants were conditionally privileged to lawfully interfere with Geske's contractual agreements and prospective economic advantage. As to the weight (if any) to be attached to this conclusion, see infra (part III,V,2).

Such ''protected'' primary picketing activity includes lawful ambulatory or roving situs picketing; see *Teamsters Local 327 (Coca-Cola)*, 184 NLRB 84, 94 (1970); *NLRB v. Distillery Workers (Adolph Coors)*, 272 F.2d 817 (10th Cir. 1959).

[58] See Geske Attorney Avakian's letter to me dated September 10, 1993, in reply to my letter of inquiry concerning a seemingly garbled footnote, with incomplete citations, in Geske's opening brief. This letter suggests that the date referred to is December 1992, more than a year after the picketing at issue in the instant case.

[59] As discussed infra fn. 60, Geske attaches significance to Local 150's failure to intervene in a representation proceeding instituted by a June 1992 request by another union for a unit of ''all employees'' and terminating in an election in a unit of truckdrivers, equipment operators, and mechanics.

each morning to the Melahn property across the street from the Geske plant, cooked breakfast, met with employees of Geske, and shared breakfast with them. I infer that during these conversations over the period of a month, Local 150 Business Representative August made at least some effort to induce his breakfast companions to join Local 150 or some other union that normally included employees with their job classifications. See also, infra, fn. 60.

The next question to be considered is whether the 1991 picketing herein was unprotected because it allegedly violated Section 8(b)(7)(C). For the reasons stated by the Regional Director (supra, part III,U,6), I find that the 1991 picketing did not violate that statutory provision. I disagree with Geske's contention that the 1991 picketing after September 19, 1991 (Geske's lawsuit was filed on September 5), with signs naming only Laborers Local 1035, was unlawful because such picketing allegedly constituted a continuation of the picketing which used signs naming only Operating Engineers Local 150, which picketing began on August 19, 1991. In so contending, Geske relies (opening Br. at 11–12) mostly on the presence of Local 1035 officers Bauman and Smith on Local 150's picket line during various days in August and September 1991, sometimes when Local 150 and Local 301 business agents were also present; on Bauman's testimony that he never attempted to interest any Geske employee in joining Laborers' Local 1035 other than through picketing;[60] on Bauman's allegedly unlikely December 1992 testimony that he could not remember certain particulars about the August–September 1991 picketing at Geske; and, apparently, on Bauman's allegedly unlikely explanations (which I have partly discredited), for his presence at the picket line (see supra, part III,U,3). The picketing after September 19 named only Laborers' Local 1035 and laborers. I conclude that the record fails to show that the August–October 1991 picketing constituted a joint venture by Operating Engineers Local 150 and Laborers Local 1035.

As previously found, Geske has from time to time requested the state court to require removal of the Operating Engineers Local 150 pickets irrespective of the message on the signs carried by them (supra, part III,S,U,2), and has continued to prosecute the state court lawsuit after these signs were no longer displayed but Laborers Local 1035 had begun carrying signs whose accuracy Geske does not question. Moreover, I agree with the General Counsel that statutory protection attached to the dissemination of the message conveyed on the signs displayed by Local 150—namely, the ''Rat Patrol'' sign (accompanied by an inflatable rat) and the signs stating, ''IUOE Local 150 on Strike Against Geske for Recognition as Majority Representative of Company's Operating Engineers.'' The word ''rat'' was protected by the statute as a pejorative rhetorical term to demonstrate Local 150's strong disapproval of workers who failed to join Local 150 and an employer that did not recognize it (see *Austin*, supra, 418 U.S. at 282–287). I do not believe that any employee, customer, or supplier of Geske would read this sign, on a truck parked at Melahn's premises across the street from Geske's asphalt plant, as alleging that Geske's asphalt plant—or, for that matter, Melahn Construction Company's facility—was infested with rodents in the literal sense; any such interpretation would be difficult to square with the statement in Lori's affidavit of September 6, 1991 (supra, part III,O) that suppliers and customers were ''intimidated'' by this sign. Nor do I believe that the ''IUOE on strike'' signs constituted a representation that Geske's employees were on strike, as they were not. Geske's contention that these signs must be read as so asserting, because a union is incapable of striking, is difficult to reconcile with the statutory provisions that forbid ''a labor organization . . . to engage in, *or* to induce or encourage any individual employed by any person . . . to engage in, a strike'' for certain objects (Sec. 8(b)(4), emphasis added). Indeed, Geske's August 23, 1991, charges against Locals 150 and 301 alleged that they had violated such provisions by leading ''neutrals to believe that the Union is 'on strike''' (supra, part III,H). Moreover, picketing has been equated with striking for the purposes of Section 13 of the Act.[61] *Curtis*, supra, 362 U.S. at 281 fn. 9; *NVE Contractors*, supra, 934 F.2d at 1087. Furthermore, according to Tigger's testimony at the state court trial, when Local 150 Business Representative Quigley told him and a police officer about August 22, 1991, that ''We are on strike against Geske's,'' Lori did not dispute this, but merely told Quigley that ''it was an illegal strike.''[62] Rather, I find that the statement on Local 150's signs constituted a strike signal urging Geske's employees to strike and requesting its customers and suppliers to refuse to cross the picket line.[63]

[60] In so arguing, Geske disregards Local 1035's voluntary participation in a December 1992 multicraft election pursuant to a June 1992 representation petition filed by the Congress of Independent Unions. In contending, however, that Operating Engineers Local 150, too, failed to engage in nonpicketing organizational activity during the picketing, which was suspended in the fall of 1991, Geske does rely on Local 150's failure to respond to the Regional Office's June 1992 request for a showing of interest as a condition for participating in the December 1992 election. I believe that the 1992 representation case was too remote in time to evidence any organizing action or inaction during the picketing in August and September (and, Geske contends, October) 1991. In any event, employees' perceived lack of interest in unionization does not establish that no organizing effort occurred.

[61] ''Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish the right to strike, or to affect the limitations or qualifications on that right.''

[62] Pease, a customer of Geske's who performed haulage for it when it could not obtain other cartage during the picketing and has had a number of disputes with Local 150, testified at the state court trial to the understanding that ''IUOE Local 150 on strike against Pease for recognition as majority bargaining representative of Company's operating engineers'' meant that Local 150 business agents were on strike against Pease.

[63] No different result is suggested by *Carpenters Local 1849 (Robert Young)*, 208 NLRB 461 (1974), where picketing beyond the 30-day period was claimed to be protected by the 8(b)(7)(C) proviso that the object of the picketing was ''truthfully advising the public'' that the union did not have a contract with the picketed employer. The Board found that the ''strike'' language showed the picketing to be directed at employees rather than the public, and that use of these words was untruthful ''in this situation''—namely, a situation in which (unlike here) the union was contending that the picketing did not have any representational or organizational object, but, rather, constituted a mere statement directed at the public alone. See *Retail Clerks v. Quick Shop Markets*, 604 F.2d 581, 585–586 (8th Cir. 1979); *Hotel & Restaurant Employees Local 568 (Restaurant Management)*, 147 NLRB 1060, 1067–1068 (1964). Laborers Local 1035 Business Agent Smith testified at the state court hearing that the

Continued

In view of my finding that the message on the picket signs was not untruthful, I find no merit in Geske's contention that dismissal of the complaint is called for by a memorandum issued by the Division of Advice on February 28, 1985, in *Samuel Rappaport Family Partnership*, Case 4–CA–14583[64] The subject matter of the state court lawsuit in *Rappaport* was alleged knowing and malicious misrepresentations to the public (partly through picketing) that the union represented Rappaport's employees; I have found that the picket signs in the instant case did not contain misrepresentations. In any event, advice memoranda do not constitute Board law. *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992).

The requests for injunctive and monetary relief included in Geske's lawsuit in state court were based on complaint allegations of trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage. When considered in connection with the evidence put in by Geske in attempted support of its request for a preliminary injunction, the complaints themselves, and Geske's briefs and other documents filed by it in connection with its complaints, show that each of these allegations is based in material part on recognitional/organizational picketing which I have found to be protected by the Act. Accordingly, I find at this point that Geske violated Section 8(a)(1) by maintaining and prosecuting this lawsuit on and after March 30, 1992, the date on which preemption was triggered. I find without merit Geske's contention in its reply brief (at 14) that the instant complaint must fail because the General Counsel failed to seek relief under Section 10(l), which affords the agency power to proceed against charged persons where there is reasonable cause to believe that they have violated certain statutory provisions (including Sec. 8 (b)(4)(A), (B), and (C), Sec. 8(b)(7), and Sec. 8(e)); cf. infra, fns. 65–66. The General Counsel makes no claim that paragraph 6(f) of the instant complaint encompasses any lawsuit by Geske based on any such 8(b) and (e) allegations which the Regional Office found meritorious. Nor is there merit to Geske's seeming contention (opening Br. at 32) that I have no power to find its lawsuit an unfair labor practice because that lawsuit is still pending and (partly because for a period of time that lawsuit was stayed by the state appellate court) the agency sought no relief under Section 10(j) of the Act. See *Bill Johnson's*, supra, 461 U.S. at 747–748; *Loehmann's Plaza*, supra, 305 NLRB at 671–672; *Great Scot*, supra, 309 at 549–550; *Johnson & Hardin*, supra, 305 NLRB at 692. Any contention by Geske that the Board's power to make an unfair labor practice finding is foreclosed by the failure to seek relief under Section 10(j) is inconsistent with the fact that the power to request such relief is discretionary and not mandatory, and with the fact that the propriety of a final order by the Board does not depend on the result of any 10(j) proceeding which may have been brought.[65] Any argument by Geske that the Board's failure to seek 10(j) relief precludes an unfair labor practice finding based on a lawsuit in state court runs contrary to the entire thrust of *Bill Johnson's*; see particularly 461 U.S. at 745– 746.[66]

B. *Whether Geske Violated Section 8(a)(1) by Filing, Maintaining, and Prosecuting a State Court Lawsuit with Causes of Action Which Are Without Reasonable Basis and Were Motivated by an Intent to Retaliate Against Operating Engineers Local 150 in Seeking to Organize Geske's Employees by Engaging in Lawful Recognitional Picketing*

In *Bill Johnson's*, supra, 461 U.S. at 744, the Supreme Court held that an employer violates Section 8(a)(1) of the Act by prosecuting a baseless lawsuit with the intent of retaliating for the exercise of rights protected by the Act. Although *Bill Johnson's*, supra, itself involved a lawsuit against employees who themselves engaged in the protected conduct which was allegedly the reason for retaliation, the Board has read *Bill Johnson's*, supra, as extending to a lawsuit filed against a union in retaliation for its having filed charges with the Board;[67] to criminal complaints filed against nonemployee organizers in retaliation for their distribution of union literature on public property;[68] and to a baseless libel lawsuit filed against a union in retaliation for the strike activity of the union's members;[69] see also *Bristol Farms*, supra, 311 NLRB 437 (employer violated Sec. 8(a)(1) by threatening to arrest nonemployee union agents who were exercising right under state constitution to handbill and picket on private property). *Postal Service*, 275 NLRB 360, 361–362 (1985), relied on by Geske (opening Br. at 34), held that a threat by the respondent employer's temporary supervisor to sue the union, motivated by the union's action in filing grievances alleging that the employer was giving her improper preference in her capacity as an employee, did not violate Section 8(a)(1) because that threat was not attrib-

''On Strike'' language on Local 150's picket sign caused him to understand that the picket was organizational.

[64] The copy of this memorandum attached to Geske's opening brief is inaccurate. An accurate copy is attached to a letter from me to counsel dated June 4, 1993, and contained in the formal file in the case at bar.

[65] *NLRB v. Acker Industries*, 460 F.2d 649, 651–652 (10th Cir. 1972); *Tall Pines Inn*, 268 NLRB 1392, JD fn. 1 (1984). Similarly, a decision in a proceeding under Sec. 10(l) of the Act does not constitute res adjudicata with respect to a proceeding on the merits under Sec. 10(b), (c), (e), and (f). *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 680–683 (1951).

[66] Geske's opening brief states (at 32), ''There is one mechanism . . . alone . . . for the [f]ederal government to exercise its Supremacy rights against a sovereign state government. In the NLRA, that mechanism is exercised by invoking the aid of a federal district court under Section 10(j) of the Act, 29 U.S.C. § 160(j). *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).'' The Board lawsuit over which *Nash-Finch* upheld the district court's jurisdiction was brought under 28 U.S.C. § 1337; *NLRB v. Nash-Finch Co.*, 434 F.2d 971, 972 (8th Cir. 1970), reversed and remanded, 404 U.S. 138 (1971); see *Johnson's* supra, 461 U.S. at 738 fn. 5. Moreover, *Nash-Finch* stated (404 U.S. at 147) that the fact that the Board is given express authority to seek injunctive relief in some sections of the Act, including Sec. 10(j) and (l), ''is not persuasive that the Act expresses a policy to bar the Board from enforcing the national interests on other matters.'' Further, the Supreme Court cited several Board orders issued pursuant to Sec. 10(c) of the Act, some of which were enforced under Sec. 10(e) or 10(f), in support of its statement in *Bill Johnson's*, supra (461 U.S. at 737–738 fn. 5) that ''we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not be lawfully imposed under the Act.''

[67] *Dahl Fish Co.*, supra, 279 NLRB at 1110–1112; see also *Giant Food Stores*, supra, 295 NLRB at 333–334.

[68] *Johnson & Hardin*, supra, 305 NLRB 690.

[69] *Diamond Walnut*, supra, 312 NLRB at 68–69.

utable to the employer, as particularly shown by the fact that the threat did not involve a form of retaliation within the framework of her supervisory responsibilities. I conclude that *Bill Johnson's*, supra, supports the proposition that an employer violates Section 8(a)(1) by filing, maintaining, and prosecuting a baseless lawsuit against a union in retaliation for its protected recognitional/organizational picketing.

Furthermore, I find that Geske's lawsuit against Locals 150 and 301 and their at least alleged agents was baseless. In so finding, I rely mostly on the determination of the state judge who conducted the state court trial that Geske had failed to establish likelihood of success on the merits, and on the action of the state appellate and supreme courts in denying Geske's interlocutory appeal. I note, moreover, Geske's representation to the Illinois supreme court, in support of Geske's motion for a stay of mandate, that ''there is little likelihood that the Circuit Court will act other than to dismiss [and] almost no likelihood that the Second District [appellate court] would reverse such a dismissal'' (supra, part III,U,11). In addition, Geske lost its appeal before the state appellate and state supreme courts after successfully obtaining a stay of further proceedings in the trial court upon the representation that the appellate court's decision on the issues appealed from ''will determine, to a large degree, the course of future litigation in the trial court,'' and that issues which would continue to be litigated absent the stay ''will ultimately be determined by the decision of the Appellate Court'' (supra, part III,U,9). Moreover, Geske's petition to the Supreme Court of Illinois (Geske's opening Br. attachment E) states that Geske's claims of tortious interference stand or fall with the claim of trade libel (at 30).[70] Geske's reply brief in support of its unsuccessful petition to the Supreme Court of the United States for certiorari (which reply brief Geske's counsel forwarded to me) states (at 9 fn. 6), ''the overriding reason why the Court should grant review at this time is that the tort of trade libel is the only available remedy to deal with untruthful statements meeting the *New York Times*, supra, standard placed on a picket sign. If certiorari should be denied the law of this case will prevent the *Linn-Lowe-New York Times* standard from being applied in view of the decision of the Second District below.'' Further, up to this point, Geske's only judicial victory in state court has been obtaining a temporary restraining order from Judge Pitluck at an ex parte hearing, without (as Geske counsel must have known) any real opportunity for defendants' counsel to attend, and entirely on the basis of three affidavits (including one from Senior, who did not testify before either Judge Sullivan or me), which order was extended by Judge Sullivan largely on the ground that the hearing on Geske's motion for a preliminary injunction had not yet been completed; as previously noted, that motion was denied upon Geske's resting its case. No reason to discount the state courts' conclusions is suggested to me by my review of the state court transcript of testimony and the various briefs and other documents that are part of both the state court record and the record before me.

[70] In addition, that petition states (at 17–18) that the unions' allegedly false signs and alleged misrepresentations ''may not fit under [the] constrained rubric'' of *Vee See*, supra, 79 Ill. App. 3d 1084, 35 Ill. Dec. 444, 399 N.E. 2d 278—although the petition later contends (at 20–21) that *Vee See*'s standards were in fact met.

As to the Illinois appellate court's ruling, it may be appropriate to discuss at this point the role which it should play in the case before me. Geske's counsel avers (see motion dated July 13, 1993) that I had been ''improperly'' informed of the appellate court's decision ''that was not published and in which Local 150 was denied their motion to publish same even though they argued to the [appellate court] that it was a key precedent and important to cite in the future.[71] This ruling of the Illinois Appeals Court . . . made it impermissible to cite this case or more importantly its ruling and its rationale.''[72] The ruling referred to by Geske denied a ''Motion by defendants-appellees pursuant to [Illinois] Supreme Court Rule 23, to change the decision from an unpublished order to a published opinion.'' Rule 23 states, in part:

> A case shall be disposed of by opinion when a majority of the panel deciding the case determines that (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court.

Accordingly, the appellate court's denial of defendants' motion means, at the very least, that the appellate court did not regard Geske's unsuccessful lawsuit as the kind of case described in the quoted material. Rule 23 further states that ''orders'' (that is, those issued without a published opinion, such as the appellate court's order in Geske's state court lawsuit)

> are not precedential and will not be published. They may be invoked, however, to support contentions such as double jeopardy, res judicata, collateral estoppel, or the law of the case.

I conclude that in considering whether Geske's lawsuit was baseless, I am permitted by this rule to consider the appellate court's statement that Judge Sullivan's decision was not reversible on appeal because it was not against the manifest weight of the evidence, and, moreover, that the picket signs were not of a libelous nature. See *Bradley v. Howard Hembrough Volkswagen*, 89 Ill. App. 3d 121, 44 Ill. Dec. 413, 411 N.E. 2d 535, 537 (App. Ct. Ill., 4th Dist. 1980); *International Association of Firefighters, Local #23 v. City of East St. Louis*, 213 Ill. App. 11, 157 Ill. Dec. 179, 571 N.E. 2d 1198, 1199–1200 (App. Ct. Ill., 5th Dist., 1991). In any event, my conclusion of baselessness would remain the same even disregarding this latter statement.

Because Federal reviewing authority may wish to review the evidence submitted by Geske to the state court, that evidence, however, has been tediously summarized above. Be-

[71] Although no copy of the motion has been tendered to me, Local 150 has not represented to me that Geske's summary of it is inaccurate.

[72] The appellate court's ''Order'' was received into evidence before me as J. Exh. XII–29 on December 3, 1992. On that date, the parties stipulated that this document was the order in question, but ''By entering into this stipulation, no party has agreed to the materiality or relevance of the matters which are the subject of the stipulation, and each party reserves the right to raise arguments regarding materiality and relevance in the presentation of its case, in briefs.'' This language aside, I can see nothing in the stipulation that would limit in this proceeding the use of the decision in question.

cause Geske has at all times primarily requested injunctive relief (on one occasion, on an ''emergency'' basis), and because since March 1992, the General Counsel has been seeking in the instant proceeding an order requiring Geske to withdraw much of its state court lawsuit, as to the state court complaint in its present form I give little credence to Geske counsel's repeated assertions (supra, fn. 4, opening Br. at 15, reply Br. at 3, 12) that after final disposition of its heretofore unsuccessful efforts to obtain a preliminary injunction (such final disposition presumably having occurred when certiorari was denied by the Supreme Court of the United States), Geske intends to introduce in support of its state court lawsuit a significant amount of evidence that counsel failed to present to me during the December 1992 hearing in the instant case or, up to this point, to the state courts in connection with Geske's lawsuit.

In addition, I find that Geske brought this action in retaliation for the protected organizational/recognitional picketing. Thus, the subject matter of the lawsuit consisted, in significant part, of the protected picketing. Lori Geske sought to use the temporary restraining order as a means of procuring the removal of all the pickets, although the order did not so require (supra, part III,O). Geske's counsel filed a motion on September 6, 1991, with the state trial court requesting the amendment of the temporary restraining order so as to in effect ban all picketing of Geske's facilities or trucks, although counsel was admittedly aware that Geske had no legal right to an injunction banning all picketing (supra, part III,S; see also part III,U,2). Shortly after the picketing began, Lori Geske asked Local 150 Representative August whether any Geske employee had signed anything with him; said that she had directed the employees not to even talk to him; told him to ''get out of here,'' that he had no right to stand outside Geske's facility; and then removed, and threw across the street, a picket sign which Local 150 had put into ground not owned by Geske (supra, part III,F). On the following day, Mike Geske took such a sign from ground not owned by Geske and, when returning the sign to August, raised his middle finger (supra, part III,G,1). Further, Tigger Geske sought on September 7, 1991, to use the temporary restraining order as a means of compelling Vulcan employee Powers to load a Geske truck, although the order did not so require (supra, part III,P); and, on August 29, 1991, earnestly asked representatives of Local 150 and 301 what Geske would have to do to take the pickets down and described the persons who were responsible for the picketing and getting the union in as ''worthless buttholes'' who were going to ''get theirs'' (supra, part III,K). I find that such remarks and conduct by Mike and Tigger are probative of Respondent Geske's motive for the lawsuit, in view of the August 29 statements of General Manager Lori Geske (admittedly an agent of Geske) to representatives of Locals 150 and 301 that instead of meeting with Geske President Senior (also admittedly an agent of Geske) they would have to meet with Lori (Senior's daughter), Tigger (Senior's son), and Mike (Senior's nephew and the son of the vice president and a half-owner of Geske); in view of Lori's failure to repudiate her brother Tigger's remarks, most of which were made in her presence; and in view of the fact that Mike's conduct showing disdain for the picketing virtually duplicated the conduct of his first cousin, Lori, the previous day. See *Panelrama Centers*, 296 NLRB 711, 713 (1989). Finally, Larry Geske (the vice president and a half-owner of Geske) testified that he ''would think'' he did not want the Union to represent his employees.

For the foregoing reasons, I find that Geske violated Section 8(a)(1) of the Act by filing a state court lawsuit against Operating Engineers Local 150 and Teamsters Local 301 about September 5, 1991; by filing an amended complaint in state court against them and Chuck August, Robert Paddock, Gary Laney, Michael Quigley, Kal Lester, Angel Delrivero, Bud Layoff, and Mike Haffner about September 27, 1991; and by maintaining and prosecuting this September 5 and 27 lawsuit; which lawsuit included certain causes of action which are without reasonable basis and were motivated by an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize Geske's employees by engaging in lawful recognitional picketing. ''Although it is not unlawful under the Act to prosecute a meritorious action . . . suits based on insubstantial claims . . . are not within the scope of First Amendment protection.'' *Bill Johnson's*, supra, 461 U.S. at 743.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local 150, AFL–CIO and Chauffeurs, Teamsters and Helpers, Local 301 are each labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) On and after March 30, 1992, by maintaining and prosecuting a state court lawsuit against Local 150, Local 301, and their alleged agents, with causes of action that are preempted by the Act and include conduct protected by the Act.

(b) On and after September 5, 1991, by filing, maintaining, and prosecuting a state court lawsuit against Local 150, Local 301, and their alleged agents, with causes of action which are without reasonable basis and were motivated by an intent to retaliate against Local 150's protected concerted activity in seeking to organize Respondent's employees by engaging in lawful recognitional picketing.

4. The unfair labor practices set forth in Conclusion of Law 3 affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act prior to March 30, 1992, by filing, maintaining, and prosecuting a lawsuit against Local 150, Local 301, and their alleged agents, with causes of action that are preempted by the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom and from like or related conduct affirmatively, Respondent will be required to file a motion with the state trial court for leave to withdraw its unlawful lawsuit to the extent it includes allegations directed against Local 150, Local 301, and their alleged agents, in the third amended complaint or its predecessors. In addition, as requested in the General Counsel's posthearing brief, Respondent will be required to reimburse the defendants in that lawsuit for all legal expenses incurred in the defense of such allegations, to date and in the future, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173

(1987); *Davis Supermarkets*, supra, 306 NLRB 426, enfd. 2 F.3d 1162 (D.C. Cir. 1993); *Great Scot*, supra, 309 NLRB at 550; *Diamond Walnut Growers*, supra, 312 NLRB at 71. I find this reimbursement order appropriate because the entire lawsuit grounded on the first amended, second amended, and third amended complaints was baseless under state law and was filed and maintained in state court for retaliatory purposes, even though the lawsuit included certain causes of action that were not preempted[73] and which might have constituted a reasonable basis for a damage suit before a Federal district court under Section 303 of the Act. I note that Geske successfully opposed the defendants' efforts to remove Geske's lawsuit to Federal district court (supra, part III,S) and, the day after the Federal district court granted Geske's motion to remand the case to state court, amended its complaint to seek merely ''financial relief incidental to injunctive relief,'' which injunctive relief it could not have obtained under Section 303. I would be empowered to issue such a reimbursement order even if the General Counsel's posthearing brief had not thus altered the reimbursement request set forth in the complaint in its final form, which complaint requested a reimbursement order ''except to the extent that . . . fees and expenses were incurred solely in defense of [Geske's] claim for damages against Operating Engineers Local 150 and Teamsters Local 301 under authority of Section 303 of the Act.'' *Kaumagraph Corp.*, 313 NLRB 624 (1994); *Sinclair Glass Co.*, 188 NLRB 362, 363 (1971), enfd. 465 F.2d 209 (7th Cir. 1972); *Government Employees Local 888 (Bayley-Seton)*, 308 NLRB 646 fn. 2 (1992). In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[74]

ORDER

The Respondent, Geske and Sons, Inc., Crystal Lake, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and prosecuting lawsuits with causes of action that are preempted by the Act and include conduct protected by the Act.

(b) Filing, maintaining, or prosecuting lawsuits with causes of action that are without reasonable basis and are motivated to retaliate against activity protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) File a motion for leave to withdraw its lawsuit docketed in the Circuit Court of McHenry County Nineteenth Judicial District, State of Illinois, as No. 91–CH–273, *Geske & Sons, Inc. v. International Union of Operating Engineers Local No. 150, et al.*, to the extent that this lawsuit includes allegations in the third amended complaint or its predecessors.

(b) Reimburse the following defendants in that lawsuit for all legal expenses incurred in connection with such allegations, to date and in the future, plus interest as described in the remedy section of this decision: International Union of Operating Engineers, Local 150, AFL–CIO; Chauffeurs, Teamsters and Helpers Local 301; Chuck August; Robert Paddock; Gary Laney; Michael Quigley; Kal Lester; Angel Delrivero; Bud Layoff; and Mike Haffner.

(c) Post at its facilities in Crystal Lake, Illinois, copies of the attached notice marked ''Appendix.''[75] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Paragraph 6(f) of the complaint is dismissed with respect to conduct prior to March 30, 1992.

[73] See *Summitville Tiles*, 300 NLRB 64 (1990); *Bill Johnson's*, supra, 461 U.S. at 747–748.

[74] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[75] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''